VETERANS' REEMPLOYMENT RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
EDUCATION, TRAINING AND EMPLOYMENT

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

JULY 13, 1988

Printed for the use of the Committee on Veterans' Affairs

Serial No. 100-55

U.S. GOVERNMENT PRINTING OFFICE

89-164 ≈ WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

H761-6.

COMMITTEE ON VETERANS' AFFAIRS

G.V. (SONNY) MONTGOMERY, Mississippi, *Chairman*

DON EDWARDS, California
DOUGLAS APPLEGATE, Ohio
DAN MICA, Florida
WAYNE DOWDY, Mississippi
LANE EVANS, Illinois
MARCY KAPTUR, Ohio
TIMOTHY J. PENNY, Minnesota
HARLEY O. STAGGERS, JR., West Virginia
J. ROY ROWLAND, Georgia
JOHN BRYANT, Texas
JAMES J. FLORIO, New Jersey
KENNETH J. GRAY, Illinois
PAUL E. KANJORSKI, Pennsylvania
TOMMY F. ROBINSON, Arkansas
CHARLES W. STENHOLM, Texas
CLAUDE HARRIS, Alabama
JOSEPH P. KENNEDY, II, Massachusetts
ELIZABETH J. PATTERSON, South Carolina
TIM JOHNSON, South Dakota
JIM JONTZ, Indiana

GERALD B.H. SOLOMON, New York
JOHN PAUL HAMMERSCHMIDT, Arkansas
CHALMERS P. WYLIE, Ohio
BOB STUMP, Arizona
BOB McEWEN, Ohio
CHRISTOPHER H. SMITH, New Jersey
DAN BURTON, Indiana
MICHAEL BILIRAKIS, Florida
THOMAS J. RIDGE, Pennsylvania
JOHN G. ROWLAND, Connecticut
ROBERT K. DORNAN, California
ROBERT C. SMITH, New Hampshire
JACK DAVIS, Illinois

MACK FLEMING, *Chief Counsel and Staff Director*

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

WAYNE DOWDY, Mississippi, *Chairman*

ELIZABETH J. PATTERSON, South Carolina
JIM JONTZ, Indiana
LANE EVANS, Illinois
MARCY KAPTUR, Ohio
JOSEPH P. KENNEDY, II, Massachusetts

CHRISTOPHER H. SMITH, New Jersey
CHALMERS P. WYLIE, Ohio
THOMAS J. RIDGE, Pennsylvania
ROBERT K. DORNAN, California

CONTENTS

July 13, 1988

	Page
Veterans' Reemployment Rights	1
OPENING STATEMENTS	
Chairman Dowdy	1
Hon. Christopher H. Smith	2
Prepared statement of Congressman Smith	23
WITNESSES	
Duncan, Hon. Stephen M., Assistant Secretary for Reserve Affairs, U.S. Department of Defense	9
Prepared statement of Mr. Duncan	34
Lunney, Capt. J. Robert, JAGC, national vice president for legislation, Naval Reserve Association	18
Prepared statement of Captain Lunney	60
Shasteen, Hon. Donald E., Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor; accompanied by David A Morman, executive director, Veterans' Employment and Training Service; and John Depenbrock, associate solicitor for labor management law, Department of Labor	3
Prepared statement of Mr. Shasteen	25
Smith, Curtis, associate director for career entry, Office of Personnel Management	14
Prepared statement of Mr. Curtis Smith	57
MATERIAL SUBMITTED FOR THE RECORD	
Statements:	
Paralyzed Veterans of America	65
Disabled American Veterans	67
Reserve Officers Association of the United States	69
Written committee questions and their response:	
Chairman Dowdy to Office of Personnel Management	71
Chairman Dowdy to Department of Labor	73
Chairman Dowdy to Department of Defense	83

VETERANS' REEMPLOYMENT RIGHTS

WEDNESDAY, JULY 13, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EDUCATION,
TRAINING AND EMPLOYMENT,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 335, Cannon House Office Building, Hon. Wayne Dowdy (chairman of the subcommittee) presiding.

Present: Representatives Dowdy, Smith of New Jersey, Kennedy, Ridge, Evans, and Dornan.

OPENING STATEMENT OF CHAIRMAN DOWDY

Mr. DOWDY. The subcommittee will come to order.

Good afternoon. I want to welcome all of you here today. The Subcommittee on Education, Training and Employment is meeting to review the implementation and effectiveness of veterans' reemployment rights, chapter 43, title 38, United States Code.

Since 1940, protection has been extended to the citizen soldier who leaves employment to serve in our nation's Armed Forces by preserving the former servicemember's right to return to his or her pre-service employment.

Subsequent to the enactment of legislation pertaining to veterans of active duty service, employment protection was established for members of the National Guard and Reserves.

Since the establishment of the All-Volunteer force, and the development of the total force policy, there has been increasing emphasis on the Selected Reserve as a cost-effective means of providing a significant portion of our nation's defense.

The role of the Reserve components has increased significantly, and, as a consequence, training time is also extended.

Because it is critical to our national defense that all components of the Reserves stay fully manned by high-quality personnel, this committee recognized the necessity to minimize any employer-related difficulties experienced by members of the selected Reserve.

Public Law 99-576 was enacted in 1986 in order to prohibit discrimination by employers in initial hiring because of an individual's status as a member of the Selected Reserve. We on this subcommittee want to know if this law has been efficiently implemented and if it is effective.

We are also concerned, however, with the other reemployment rights provisions. Is the law clear? Is it effective? Are any changes necessary? If so, we'd like to hear your recommendations.

I expect that we may be called to the floor for two votes this afternoon, so I won't take any more time. Because our time may be somewhat limited, I'd like to also ask our witnesses to limit their testimony to five minutes. Your entire written statements will, of course, be included in the hearing record.

Following the hearing we may submit written questions to you, and we would appreciate prompt, full responses to those questions.

Finally, I request that without objection the hearing record be kept open for one week for any additional information that may be submitted.

I would yield at this time to the ranking minority member of the subcommittee, my good friend and colleague from New Jersey, Chris Smith.

OPENING STATEMENT OF HON. CHRISTOPHER H. SMITH

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

First of all, I appreciate your initiative and efforts in setting up this hearing today to review the reemployment rights for members of the Armed Forces.

As I am sure the testimony of our witnesses will indicate, reemployment rights affects not only the individuals in today's All-Volunteer total force, but is also an issue vitally important to the security and preparedness of our nation's military.

Over the past few years Reserve forces have grown substantially as emphasis has shifted from the active to the Reserve component of the Armed Forces. As a result, the defense of our nation is largely dependent upon reservists who train and serve with the Armed Forces when required, but otherwise maintain full-time jobs.

Obviously, cooperation from the reservists employer is essential to enable the reservist to serve his or her country.

Employers failing to comply with the existing reemployment rights impair our nation's ability to maintain and ready and able military. An employer who penalizes a reservist for his or her military obligations away from work is harming both the individual—by creating a conflict at the work place—and the military by making it difficult for an employee to participate.

Mr. Chairman, I do ask that my full statement be made part of the record. Cognizant of our time restraints, you have consent to revise any statement.

[The prepared statement of Congressman Christopher H. Smith appears on p. 23.]

Mr. DOWDY. Thank you very much, Chris.

Our first witness this afternoon will be the Honorable Donald Shasteen, the Assistant Secretary of Labor for Veterans' Employment and Training.

Don, we thank you for being here today.

Don is accompanied by Mr. David Morman, who is Executive Director of the Veterans' Employment and Training Service.

Don, it is very good to see you again before this subcommittee. We welcome you, Mr. Secretary. Please begin.

STATEMENT OF HON. DONALD E. SHASTEEN, ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR; ACCOMPANIED BY DAVID A MORMAN, EXECUTIVE DIRECTOR, VETERANS' EMPLOYMENT AND TRAINING SERVICE; AND JOHN DEPENBROCK, ASSOCIATE SOLICITOR FOR LABOR MANAGEMENT LAW, DEPARTMENT OF LABOR

Mr. SHASTEEN. Thank you very much, Mr. Chairman. It is a privilege to be here with you and with Mr. Smith and the other members of the committee to talk about the veterans' reemployment rights program—some of the accomplishments and some of the problems that we have been having with it.

With your concurrence, I would like to submit my written testimony for the record, give you a brief overview, and then perhaps invite Mr. Steve Duncan, the Assistant Secretary for the Reserve Affairs, Department of Defense, to join me at the table and he can present his statement, then we can jointly answer questions.

As you know, the Veterans' Reemployment Rights Statute was enacted in 1940 as part of the Selective Service Act of that year, primarily to assure veterans returning from military service in World War II that they could return to their old civilian jobs.

It has been modified over the years to provide protection for National Guard and Reserve members in their civilian jobs, and it is codified under chapter 43, title 38.

It was transferred to our agency—the Veterans' Employment and Training Service—from the Labor Management Services Administration, Department of Labor, four and a half years ago. We have, since that time, combined it with our other programs in what we call the Office of Veterans' Employment, Reemployment, and Training.

We now have, under the combined procedure, 241 employees in the field who have training to deal with all or portions of this act and the complaints that we receive under it, instead of the 22 to 25 special agents that we had originally.

Since receiving the program on October 1, 1983, we have had a total of 7,645 cases opened, and we are quite pleased with the fact that 94 percent of our cases since then have been resolved by negotiation rather than litigation: we recovered about seven and a half million dollars in back wages, we have gained some rather valuable pension credit for World War II and Korean veterans, we have regained seniority rights for some individuals—all of it in the private sector, of course, because State and local governments did not come under coverage until December 3, 1974. Those are the areas that are covered by the responsibilities of our agency.

In addition to the cases that we formally opened, we resolve a lot of problems by telephone and by conference where we receive questions. Unfortunately we don't track those, so we don't have a record of that.

We work very closely with the National Committee for Employers' Support of the Guard and Reserve, which has a sizeable force of volunteers in the field who, many times, are the first people to come in contact with a problem, because they receive information about it either directly from the employee or from the commander of the unit when one of the Guard or Reserve members in that unit

is having a problem. These people are called ombudsmen, and they make the initial contact many times, and they do have a rather quick turn around. If they can't resolve the case or problem in seven to ten days they contact us.

During the four and a half years, we have referred about 200 cases to the Department of Justice. We regularly have a case load pending in Justice of about 120, on average.

We feel litigation is a very necessary process. It is important to have some of these issues decided by law so that large blocks or large numbers of reservists and Guard members who are similarly affected, as well as veterans, under the original statute, can be protected in the future by case law.

One of the problems that has come up that is of great concern to us is that the new law giving us responsibility for investigating hiring discrimination—until the fall of 1986 we had responsibility only for investigating discrimination after the individual Guard or Reserve member was on the job.

Hiring discrimination and protection of Guard and Reserve members is a new responsibility. We have had a total of 53 cases so far—19 the first year, 34 the second year. Compared with the 94 percent we have been able to resolve by negotiation in the overall program, we have been able to resolve by negotiation only 36 percent of those hiring discrimination cases. So we are intensifying our training in that area, and we are looking at problems that are different about hiring discrimination that are causing us to be in a position where we might have to go in court more often.

I think those are the highlights. We have taken some steps, which are outlined in my testimony, to deal with these problems.

With that, I would be glad to open it for questions.

[The prepared statement of Mr. Shasteen appears on p. 25.]

Mr. DOWDY. Thank you very much, Mr. Secretary.

I have reviewed your testimony, and I want to commend you for the apparent success—the 94 percent resolution percentage and the amount of money recovered in back wages for veterans, Guard, and Reserve members.

Reading the paragraph dealing with this information in this record, it seems—and I applaud you—that you take a lot of pride in that which has been recovered through your conciliation efforts. You point out $2 through conciliation for every $1 recovered through litigation.

Is there any discernable reluctance to pursue the litigation, or is this an indication that your conciliation efforts have been very successful?

Mr. SHASTEEN. We believe, since we are dealing with employers whose cooperation we need in order to maintain a strong defense under the total force concept, that we should exhaust every possible effort to resolve the problems that occur by negotiation.

We resort to litigation as a last resort, and I think for good reason. We don't attempt to penalize or punish the violators of this law; we simply attempt to protect the Guard and Reserve member and make the person whole if something does occur such as loss of a job, loss of seniority, loss of pension benefits, change in work hours from a day shift to a night shift as a result of military duty. We don't try to penalize or punish.

Mr. DOWDY. If a reservist or guardsman feels that an employer is not complying with the law, review the steps which should be taken by that individual. If his complaint has merit, what is the process from that point, and what is the role of the veteran?

Mr. SHASTEEN. Well, the first thing that the individual should do is to contact his or her unit commander and make that commander aware of the problem.

If that happens, under the system which Assistant Secretary Steve Duncan and his staff have in place, the commander will have an ombudsman from the National Committee for Support of the Guard and Reserve, who generally is another employer, contact that individual. It assists in the quick resolution of these cases if one employer, who is familiar with the law, can, on a voluntary basis, contact the employer who has caused the problem and make that employer aware of the provisions of law and their responsibilities under the law.

If that ombudsman doesn't succeed in correcting the problem and resolving the problem within seven to ten days, the Department of Defense has recommended that the ombudsman then put the reservist or Guard members in contact with our agency, either one of our directors at the State level, or an assistant director, or one of our VRR agents located in area offices.

It then becomes a matter for the Guard or Reserve member to decide whether he or she wants to file a formal complaint. We don't really begin an investigation until we interview the Guard or Reserve member and give that person an opportunity to decide whether to sign a formal complaint.

We then proceed to investigate that complaint, and when we complete our investigation, tell the Guard or Reserve member whether we feel that there has been a violation of the law, and what the options are.

We endeavor to negotiate a solution. If we can't achieve a negotiated solution, we then discuss it again with the Guard or Reserve member and give that person an opportunity to sign a request for us to refer the matter to the Department of Justice for prosecution.

So there are two steps in the formal process. The first is the signing or the filing of the original complaint by the Guard or the Reserve member, and then secondly, if we can't resolve it by negotiation, we give that Guard or Reserve member the opportunity to request that we go to the Justice Department.

If we feel that the Guard or Reserve member does not have a valid case, we explain that to the individual. We still give the individual the option of taking all of the information we have, plus any additional information that he or she might be able to gather, hire his or her own attorney, and go to court on their own.

Mr. DOWDY. Mr. Smith?

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

First of all, I want to commend Mr. Shasteen for the outstanding job that he is doing, and also for the excellent testimony he has provided to the committee.

I do have a couple of questions—and I know we do have a vote, so I will just ask my first.

Mr. Shasteen, you note in your testimony, on page 4, that during the past four and a half years DOL has referred about 200 cases to

the Department of Justice. I wonder if you could tell this committee how many of those cases were actually prosecuted in the courts?

Secondly, do you believe that the threat of prosecution is actually a deterrent to discrimination in the work place?

Mr. SHASTEEN. Mr. Smith, I appreciate your opening comments very much.

I have neglected to introduce the two people at the table with me. On my right is Mr. David Morman, who is the General Manager and Executive Director of our agency with special responsibilities in the veterans' reemployment rights area, and also in developing and implementing our new management information system.

On my left is Mr. John Depenbrock, who is the Associate Solicitor for Labor Management Laws in the Department of Labor. He is our person in charge of litigating VRR cases.

I would like to defer the first part of your question, if I may, to Mr. Depenbrock, who is more familiar with the process at the level where these cases are referred to Justice.

Mr. DEPENBROCK. Thank you very much, Mr. Shasteen.

Congressman, I don't have with me today the specific statistics regarding those cases, but I can get them to you within the week.

But let me just say that we have tried to develop a continuing professional relationship with the Department of Justice here at the national level, and, as you well know, with the U.S. attorneys in the field. One of the purposes is to expedite these cases on a little bit faster track over a period of time.

Like Mr. Shasteen said, the ultimate objective is to settle these cases before they get into litigation, as you well know, because that is much more effective than getting into litigation.

Mr. SMITH OF NEW JERSEY. If I may follow up on that, previous to the four and a half years of your tenure, were there cases prosecuted? What were the outcome of those? If you could provide that also, I would appreciate it to further flush out the record.

Mr. DEPENBROCK. Okay.

[The information appears on p. 33.]

Mr. DOWDY. We've got a vote, so we will stand adjourned for just a couple of minutes.

Mr. SHASTEEN. All right. Fine. Thank you.

[Recess.]

Mr. DOWDY. We'll wait a few minutes to allow Mr. Smith to return.

While awaiting Mr. Smith, let me go forward. In your view, the veterans who have been denied their reemployment rights now have access to prompt, speedy, and inexpensive adjudication of their claims. Do you support the establishment of a new adjudication procedure? And if so, what sort of structure would you recommend?

Mr. SHASTEEN. Mr. Chairman, we have a task force representing the Department of Defense and the Department of Justice, along with our own agency, and our solicitor's office, that is looking at the entire process, including adjudication procedures.

We haven't reached a final determination. I hope within the near future to have some specific recommendations to make to the

Secretary within the Department of Labor for a legislative package that will address that issue.

We have not really come to a conclusion yet. There are several different options that are under discussion.

Mr. DOWDY. Mr. Smith?

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

Mr. Shasteen, where does DOL stand on the revision of the veterans' reemployment rights law? Wasn't there an ongoing revision underway?

Mr. SHASTEEN. Yes. We've had a task force working for about a year now considering a number of needed changes. The person from the department who chairs the task force is Dave Morman, who is with me here at the table. I'm going to ask him to respond to that and give you an overview of where that task force has been and where it is today and how close we are to having some specific recommendations to make.

Mr. MORMAN. We've been working closely with the Department of Justice and the Department of Defense on a legislative proposal. The intent of the proposal is to simplify the statute, to add what we think may be some needed clarifications in the law, and to look at the adjudication scheme to assure that we get prompt settlement of cases for guardsmen and reservists, but at the same time ensure that veterans continue to have reemployment rights coverage under the law.

We hope that we can have something formally adopted by the task force as a consensus legislative proposal that will then be sent to the Secretary of Labor, the Secretary of Defense, the Director of OPM, and the Attorney General as proposed legislation with a recommendation to those officials to place it into their policy review process. We hope to be able to do that in the very near future.

Mr. SMITH OF NEW JERSEY. Do you expect it will be done before this administration leaves office?

Mr. SHASTEEN I certainly hope so. It is my goal to do that. We spent a year looking at it. We pretty much know what the problems are. We have the options on the table. And it is time for us to make a decision.

I believe that we will have that decision very shortly, and I can assure you that I am going to push to get it through the Department of Labor and through the administration so that it can come before this Congress for consideration.

Mr. SMITH OF NEW JERSEY. One final question if I could, Mr. Chairman.

It is my understanding that the reservist spends, on an average, about 50 days fulfilling his or her obligation. How many of those days actually are taken from the work place? Much of it, of course, is weekends. Depending on the nature of their employment, that may or may not be a problem. But on average, how many days are we actually talking about?

Mr. SHASTEEN. My recollection, Mr. Smith, is that actually about two weeks are taken from the work place, because you have a lot of weekend drills and weekend meetings.

There are occasions, though, where it is longer—especially in an emergency such as the troop movement to Honduras not too long ago.

Also, the increase in training that is required—we are feeling the impact of that in the complaints that we receive. The increase in training, in some instances, requires units to be called to active duty for training for three weeks instead of two weeks during a year, and that is where we begin to receive complaints regarding problems that these Guard and Reserve members are having with their employers.

Mr. SMITH OF NEW JERSEY. One final question, Mr. Chairman.

Does the Department of Labor need subpoena authority for investigation of reemployment cases?

Mr. SHASTEEN. Mr. Smith, I feel very strongly that we do need that—especially with the additional responsibilities for investigating hiring discrimination. There are a lot of subtleties in conducting that kind of investigation. Without subpoena authority we can't get the information from some employers.

I'm going to ask Mr. Morman to elaborate on that a little bit, because he has had a rather extensive background in civil rights investigations—both at the Department of Justice and at the Department of Labor—before coming with our agency—the kinds of problems that we face in dealing with hiring discrimination, as opposed to discrimination after the individual is already on the job.

Mr. MORMAN. Sir, currently we depend upon the cooperation of the employer in obtaining information such as accessing employer records or interviewing employees associated with the case or protecting individuals that we do interview from retaliation. Generally we get cooperation and good will from the employers.

Until recently, the lack of subpoena authority has not been a major road block in our investigations. In some cases, vets might have provided better and more timely service to claimants if we had had such authority—cases such as seniority or pension cases where we needed access to a great deal of information, but the key difference that has occurred is in the 1986 amendment where you added protection from discrimination in hiring.

In the previous context, we had dealt with an established employer-employee relationship. At some point that employer had made a decision that he or she wanted that person to work for them.

In the new context the employer is making exactly the opposite decision. They are determining that they do not want that person working for them. So the cooperation level, as you might expect, is much less in cases where there has never been an employment context between the claimant and that employer has made a positive decision that they do not want that employee to work for them. So we get much less cooperation.

Moreover, the information required to establish such cases is greater. We need to look at the historical context within which this hiring decision took place. Is there a record of this employer not hiring a guardsman or reservist? We need additional information about the employer's hiring practices other than that particular instance.

So in this case, we think that in the future subpoena power will be much more significant.

Thank you.

Mr. DOWDY. Thank you, Don.

Mr. SHASTEEN. Thank you Mr. Chairman and Mr. Smith.

Mr. DOWDY. Our next witness this morning is the Honorable Stephen M. Duncan, Assistant Secretary of Defense for Reserve Affairs.

Mr. Secretary.

STATEMENT OF HON. STEPHEN M. DUNCAN, ASSISTANT SECRETARY FOR RESERVE AFFAIRS, U.S. DEPARTMENT OF DEFENSE

Mr. DUNCAN. Thank you, Mr. Chairman.

Good afternoon. I am delighted to be in even a second hearing today as long as it's talking about Guardsmen and reservists.

I, too, would like to request that my prepared statement be inserted in the record. Let me just briefly complete my opening remarks so I can respond to any questions you might have.

I would like to summarize some of the observations that members of the committee have already made today.

It is a fact that the majority of our National Guard and Reserve forces today are part-time members of the Selected Reserve, and most have full-time civilian jobs.

Matters which relate to the reconciliation of civilian employment, Reserve duty schedules, and the potential impact of involuntary mobilization affecting over 1.6 million Ready reservists—which is roughly 43 percent of our total force—are, necessarily, of very great importance since we rely on an All-Volunteer force to meet our national security commitments around the world.

The basic protection provided under the law, of course, is the right of reinstatement to employment following military service. The protection includes the right to reinstatement of the seniority status and rate of pay which the employee would have received but for the performance of military service. Additional protection, benefits, and entitlements may also exist, but they depend upon a variety of factors, including the manner of entry into military service and the type of duty performed.

The committee has requested that I comment today on the implementation and administration of chapter 43, title 38, that is on the effectiveness of that provision in the public law which prohibits employment discrimination because of an individual's status as a member of a Reserve component. I also understand the committee would like to discuss the resolution of employment disputes, and I am happy to do that.

Since the enactment of the basic statutory employment protection, the law, of course, has been amended on several occasions, and there have also been several changes to related statues and programs which have not been fully reflected in the employment protection statute.

With the introduction of the All-Volunteer total force, the importance of employment protection for the Selected Reserve has increased significantly. The substantial growth of the National Guard and Reserve forces in recent years, the important missions that have been assumed by our Reserve forces—even today, and certainly in recent years—and the training which is associated with this growth and change have increased the frequency and the length of the absences of reservists from their civilian work place.

New problems are emerging which were not contemplated when the current reemployment statutes were enacted. It may well be, therefore, that the current status of the law is not adequate for the modern relationship between Reserve component personnel and their civilian employers.

It is a fact that over 80 percent of the enlisted members and 90 percent of the officers in the Selected Reserve are full-time employees of private or public companies, institutions, and individual employers. Reservist employees are inevitably concerned about how their employer views their participation in the Selected Reserve. Employment conflicts have accounted for as much as one third of the unprogrammed losses in the Selected Reserve.

I am happy to report, however, and to confirm that in recent months we have been working with the Department of Labor to try to identify what type of legislative changes might be helpful to make the statutes affording protection for reservists more consistent with what is going on in the total force and the new missions that have been assigned in recent years by the National Guard and Reserve. I am fully confident that we are going to be reaching agreement on that before long, and, of course, we will staff it through Executive Branch and we will be anxious to submit it to the Congress.

With that, Mr. Chairman, I have no other opening comments, but I would be very happy to respond to your questions.

[The prepared statement of Mr. Duncan appears on p. 34.]

Mr. DOWDY. Thank you very much, Mr. Secretary.

In your prepared statement you indicate that the lack of information and misinformation about the importance and the quality of the Selected Reserves are the primary factors which result in a lack of support for individual guardsmen and reservists.

It appears to me that the State employer support programs could make an extremely valuable contribution by doing outreach to employers in their States and correcting the situation.

Is employer outreach a major function of the State programs?

Mr. DUNCAN. Yes, sir. Let me, with your indulgence, give you a little background.

We now have something like 3,500 volunteer employers throughout the country—in 50 States and 4 territories—who are people who understand and support what guardsmen and reservists are doing. They are the best people, in our opinion, to help us resolve quickly and informally, the kinds of disputes that arise.

It is far better, in our opinion, for an employer who is a local businessman who may know—in fact, there are many instances where he does—know the employer that he is calling on the phone to discuss resolution of employer disputes.

So that, to me, is something that is a very high priority. I have made it so since I have assumed office, and I think it is working very well.

There is a lot more to be done, but we can see daily how many more people we are getting into the program and how well it is working.

Mr. DOWDY. We are also concerned about the reasonable test issue. You discussed that in your testimony. Would you further describe the difficulties that you are having on this? Is this an issue

being discussed by the inter-agency task force? And, if so, can we expect a legislative recommendation?

Mr. DUNCAN. Yes, sir. It is being discussed. In a nutshell—and this may be a little simplistic—but, in a nutshell, we are finding that in certain instances judges who are adjudicating disputes take a "reasonableness" approach—a balancing test approach—and weigh the imposition on the employer and the hardship on the employer versus the military obligations of the employee reservist.

In a perfect world we would like to think that any valid order issued by the government to a reservist would be the end of the discussion. But we also recognize that from time to time there is the potential for a young reservist to abuse the process and claim that he has Reserve military obligations when he doesn't.

So what we are exploring—and I'm not prepared to say how we're going to come down—but generally what we are exploring is a concept where if a reservist has been issued orders which are established to be valid, proper orders, then before the employer can take any kind of disciplinary action against the employee reservist he would have to establish certain factors.

We haven't decided what those should be but, for example, that the employee has received orders that would require an absence of 7 months. That's an exaggeration, but the employer should have the burden to establish that he was not given sufficient notice, for example, or that the employee has been gone an unreasonable amount of time in the last 6 months, and so forth. In such cases there might be grounds for an exception to the normal protection of employment rights.

But we have to have our employees who are reservists, ready to perform their military duties. As you know, the president—any president—has statutory authority given to him by Congress to call to active duty up to 200,000 members of the Selected Reserve without even a declaration of a national emergency.

Given our world-wide commitments today, our reservists have to be ready to go. We are assigning them ever-increasing missions. We have given them ever-increasing equipment. And it is important that they be ready to go. I preach this message as much as I can, but it is important that our employers understand that, and understand that their employees aren't going off to some fun summer camp, but they are engaged in deadly, serious business that affects all of us, and they have to be ready to go should the call come.

Mr. DOWDY. Are you, Mr. Secretary, satisfied with the speed with which reemployment rights disputes are currently being settled? Or should we be considering other resolution procedures?

Mr. DUNCAN. That is also one of the issues that our joint task force is addressing. I guess I'm not sure that I would ever be satisfied with the speed in which disputes are adjudicated.

As a practical matter, I'll give you an example. You take a 20-year-old reservist who probably is just starting to make his way in his own work place. He is anxious to succeed to make a good impression on his boss, but he is also anxious to serve in the Armed Forces and the Selected Reserve.

If he has a dispute that arises that doesn't appear to be something that he can solve himself in a short period of time, he is usually not anxious to have it drag out and involve a litigious proceed-

ing with his employer. He is anxious to get it resolved. We are anxious to get it resolved. Otherwise, we may lose him.

So where I start from—and I know the Department of Labor shares this view—I am anxious for a very quick, very speedy, very cheap, and informal resolution. I would not like to use the force of the law unless it is absolutely necessary. I would much prefer that one employer talk to another employer and be able to say, "Look, here is how important this is, and you just don't understand what existing law is." We are successful with that in most cases, and I would much prefer to do it that way, because the ultimate objective is not to make case law, but to resolve disputes and help the reservist get on with his military duties.

Mr. DOWDY. My time has expired. Mr. Smith?

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

Mr. Duncan, on page 10 of your testimony you state that the national committee receives various inquiries regarding certain provisions in current law. Which provisions in the law are most frequently questioned?

Mr. DUNCAN. The kinds of questions that come in involve several subjects. First of all, the inquiries that come in to our national committee come from both employees who are reservists and from employers. The bulk of them come from the employee reservist.

The kinds of questions can be: Misunderstandings over what is active duty versus inactive duty; how important is a weekend drill compared to the two weeks of annual duty for training?; and those kinds of things. Do I have to pay my employee and give him his private salary? Do we have to continue to pay him while he is on military duty, or can I cut off his pay for that period, or should I? Or just what are the limits of the law? Much of the national committee's work is about education. We have a massive challenge to educate employers.

I start with the presumption that most employers will wilfully and enthusiastically comply with the law. The problem is that many employers don't know what the law is. We have grown so rapidly with our Selected Reserve and assigned so many new missions that much of what we do is educating the public and employers about what the limits of the law are. That is much of what the work of NCESGR is—the national committee.

Mr. SMITH OF NEW JERSEY. Do you find that same enthusiasm in the program among the very, very small employers? In those companies, one worker can be extremely important.

Mr. DUNCAN. There is no doubt that the employer which is a 15-person company is challenged much more than IBM by having an employee who is a national guardsman or reservist. That puts a premium on doing such things as giving fair and good notice to the employer. We also need to make sure that our Reserve chiefs and our services don't cancel orders or change the dates of the military service required by the orders.

That is a fair question for employers to ask. So we do everything possible to let them know what the obligations of their employee is, and to make sure that we don't change schedules and foul up their planning.

I have had employers tell me that the thing that bothers them more than any other factor is their inability to plan their work

force, and that if they have the ability to plan their work force, they can work around most problems.

Mr. SMITH OF NEW JERSEY. Mr. Duncan, in your opinion should the reemployment rights law afford opportunity for relief of aggrieved employers?

Mr. DUNCAN. In what sense, sir? Do you mean—

Mr. SMITH OF NEW JERSEY. Well, what rights do they have under current law if they feel that they have been unduly put upon by a veteran or member of the National Guard or anyone who seeks to exercise their prerogatives under the law. What is their way of coming back if they feel they have been violated in some way?

Mr. DUNCAN. If a reservist, for example, abuses his position and takes active duty that is not necessary or something?

Mr. SMITH OF NEW JERSEY. That could be one example. There are probably—I don't know if it is even a problem, which is why I am asking.

Mr. DUNCAN. I must tell you, I do not—

Mr. SMITH OF NEW JERSEY. Are there any examples where an employer has asked what their rights are under current statute and how they can exercise it, because he may feel that, for instance, perhaps a reservist was not up front and said they were in the Reserve when he was seeking employment. How would that factor into it?

Mr. DUNCAN. Well, of course, my view is that that shouldn't be a factor.

Mr. SMITH OF NEW JERSEY. Okay.

Mr. DUNCAN. I mean, the fact that an employer didn't know his employee was in the Reserve forces. One of the important things that we are trying to accomplish is the protection of the hiring rights of reservists, i.e., we want to ensure that a person is not discriminated against because—

Mr. SMITH OF NEW JERSEY. Based on the factor. Right.

Mr. DUNCAN [Continuing]. Based on the fact that he is a drilling member of the Selected Reserve.

We do know that a large number—I'd say something in the neighborhood of 10 percent, as I understand it—of the inquiries that come in to our national committee on our toll-free number are from employers asking about the exact parameters of the law and what the limits are and so forth.

I've really not had anything reach my level, at least, about employers complaining that somehow they have been abused. I recognize that the potential for abuse by a young person who is just entering the work force is there, and I don't take the view that the reservist is always right. That's why we're working with this joint task force to try to make some recommendations which will recognize the absolutely essential national security needs of our country and the individual member of the Selected Reserve, but recognize, also, the rights of the employer and not unduly interfere with those rights.

But as a practical matter, employers have to understand that this is serious stuff. It is no longer an avocation. When employees join the Reserve forces, they have committed to be ready to go, and their employers must recognize that.

89-164 O - 88 - 2

Mr. SMITH OF NEW JERSEY. I think it would be most helpful to this committee if you could provide us—and perhaps this has been done in the past—some of the sample publications that you provide to the employers outlining the ten most-often asked questions, or that type of publication if there is such a thing.

Mr. DUNCAN. Absolutely.

Mr. SMITH OF NEW JERSEY. And perhaps we can make that part of the record.

Mr. DUNCAN. I'll be happy to do so. And I might add that many of the materials that we use and rely upon are materials that are produced and published by the Department of Labor. After all, our people who work in the employer support program are not there to enforce the law in the sense of the Department of Labor, but to help resolve these disputes quickly and informally.

I would be glad to supply that information.

[The information appears on p. 51.]

Mr. SMITH OF NEW JERSEY. Thank you. And I thank you for your testimony.

Mr. DUNCAN. Yes, sir.

Mr. DOWDY. Thank you, Mr. Secretary, for being with us this afternoon.

Mr. DUNCAN. Thank you, sir.

Mr. DOWDY. Our next witness is Mr. Curtis Smith, Associate Director for Career Entry, the Office of Personnel Management.

We are very happy to have you with us this afternoon, Mr. Smith, and welcome you before the committee and ask that you proceed.

STATEMENT OF CURTIS SMITH, ASSOCIATE DIRECTOR FOR CAREER ENTRY, OFFICE OF PERSONNEL MANAGEMENT

Mr. CURTIS SMITH. Thank you.

The Federal Government has a long tradition of providing fair treatment to employees whose Federal civilian service is interrupted by military service, including active duty for training, and inactive duty training by members of the Reserve components of the National Guard.

Such employees are entitled to be reemployed in the position they left or an equivalent position in the agency and have all the rights and benefits when they return that they would have had if they had never left.

They are even entitled to career promotions during their absence. And, of course, there can be no discrimination against these employees, either in initial hiring decisions or in the later treatment they receive.

To ensure that these rights are provided, title 5 of the United States Code assigns to the Merit Systems Protection Board the responsibilities of the old Civil Service Commission to hear any appeals arising from employees who feel that they have not received any of their rights under the veterans' reemployment laws in title 38.

OPM, itself, handles only cases where certain rare circumstances make it necessary to place a returning veteran in some agency other than the one that originally employed the veteran.

While we at OPM do not ordinarily have any involvement in MSPB's handling of veterans' reemployment cases, we understand that very few cases arise, which is quite significant given the fact that Federal employees make up a very large portion of the Reserves—an estimated 15 percent.

The use of MSPB to adjudicate Federal reemployment cases helps get these cases settled quickly since they don't have to go to court the way private sector cases do.

It appears to us that when cases do arise, they are more often due to ignorance rather than to malice; therefore, in order to educate Federal agencies on their obligations to employees returning from military duty, we have been revising all of our guidance in this area.

We began with a complete revision of our regulations. Our old regulations were quite complicated and confusing and obsolete in some respects. The new regulations, which took effect in February, are much more clear, and should help resolve any confusion arising when employees return from military service.

We have also completely re-written our Federal Personnel Manual chapter on restoration to duty. The FPM is our basic form of guidance for operating personnel offices throughout the government, and this new guidance should help the people who are actually processing the necessary personnel actions to understand their obligations to returning veterans and reservists.

Finally, we are working on a pamphlet for employees who perform military duty to make sure they understand their restoration rights and how to exercise them. We have been consulting with interested groups on this pamphlet and hope to issue it shortly.

We believe these efforts will have a significant impact on any remaining confusion among Federal agencies on their obligation to employees who return from active duty or who are in the Reserves or the National Guard.

Thank you.

I will be pleased to answer questions.

[The prepared statement of Mr. Curtis Smith appears on p. 57.]

Mr. DOWDY. Thank you very much, Mr. Smith.

Do Federal agencies have the right to independently review the military necessity for lengthy or frequent military periods for members of the National Guard and Reserve? Couldn't the definition of "reasonableness" vary from one agency to another? Would this not create a rather confusing and chaotic situation?

Mr. CURTIS SMITH. Well, first of all, I don't believe that I would say that they have a right to review the military decision. That is a decision that only the military, I think, is in a position to make.

What it does seem to be reasonable for them to do when there are concerns that leave is too frequent or too long and it becomes a problem for getting the civilian work done is to discuss with the military the necessity of what is going on at that particular time.

It will vary, because I think it will vary with particular employees about how critical presence is at a job at a particular time. But I think the important part is that that is, in fact, a call for the military.

Mr. DOWDY. If a Federal agency is notified by an employee that the reason for leaving a position is to perform military duty, does

the agency have the responsibility to inform the employee of restoration rights? If so, do you think Federal agencies are complying with this requirement?

Mr. CURTIS SMITH. They certainly have the duty to tell the person about restoration rights, what their status will be when they come back, and also the right that they can appeal anything by the agency that seems to them to infringe on these rights.

It seems to me that agencies are complying. We receive very few inquiries from employees about restoration rights. And we hope that the pamphlet we're putting out will improve that situation even further.

Mr. DOWDY. In testimony later the Naval Reserve Association will recommend that the Department of Labor be given responsibility of assisting Federally-employed veterans or reservists in their efforts to secure their reemployment rights.

I agree with testimony submitted by the Disabled American Veterans which asserts that Federal employees should have representation and assistance similar to that available to private sector employees. Would you support the Naval Reserve Association's recommendation?

Mr. CURTIS SMITH. I'm not prepared to give a definitive answer to that here. I would certainly consider it.

I think what we are all after in common is absolute protection for employees who are serving our military in this capacity.

I would want to think through, though, such things as—for example, we now use the Merit Systems Protection Board rather than the courts, which is easier and quicker.

I would be concerned about drawing that process out by bringing counsel into it. But if, upon looking at it, it seems clear that that will help these people, then I would be glad to do that.

Mr. DOWDY. Did OPM consult with the Department of Labor and the Department of Defense prior to the revision of OPM regulations and Federal Personnel Manual chapters on veterans' reemployment rights? If so, were their comments taken into account? And if not, why not?

Mr. CURTIS SMITH. We did, in fact, hear from and consider seriously what both of those agencies had to say. Our friends at DOD actually helped write the material that we put out.

Mr. Shasteen at Labor raised some questions after we had pretty much finished our work. We considered those, and on advice from counsel, decided that what we had done was the appropriate thing to do.

I have looked at that in the course of preparing for this hearing, and it seems to me that we are really talking about the flavor we have given the description, and I would be willing to reconsider that.

Mr. DOWDY. What were the recommendations from Mr. Shasteen?

Mr. CURTIS SMITH. I believe the real issue is the one that you started with, Mr. Chairman, about the right of the Federal agency to question the military necessity. And, as I say, I agree that that is a military decision, and I believe that the dispute centers around how we ought to advise agencies about what to do when they are concerned about excessive or too-frequent requests for leave.

Mr. DOWDY. When will the new pamphlet for Federal employees be available?

Mr. CURTIS SMITH. Certainly by the end of the year. We are waiting to hear from our friends in the veterans' organizations and elsewhere.

Mr. DOWDY. We would appreciate it if you would provide the subcommittee with several copies when it may be published.

Mr. CURTIS SMITH. We'll be happy to do that.

Mr. DOWDY. Mr. Ridge?

Mr. RIDGE. Thank you, Mr. Chairman. I do have a couple of questions.

The first question is a very broad question—perhaps even a philosophical one—but I'm interested in learning from you how OPM views the veterans' reemployment rights. Is it a matter of individual rights to be litigated by aggrieved parties before the Merit Systems Protection Board? Or is it a matter of government-wide policy to be enforced by OPM on behalf of individuals?

As an analogy, you could be an observer on a street corner and watch a mugging, and you'd have to get subpoenaed and dragged into court in order to see that the truth and justice was done. Or you could be a policeman and get involved right away and make sure that the rights were protected.

How does OPM look at the issue?

Mr. CURTIS SMITH. I believe we look at the issue from the perspective of our role under the Civil Service Reform Act, namely that our obligation at OPM is to advocate and advance government policy which, in this case, is strongly in favor of permitting our civilian employees to serve as reservists.

The enforcement arm, on the other hand, is with the Merit Systems Protection Board, which may not be unlike the distinction in the private sector with the Department of Defense working with employers, on the one hand, and the Department of Labor serving as the policeman, if that is the correct analogy, on the other.

Mr. RIDGE. I just want to take it a little further because I'm not sure I understand the practical application of your answer.

Does OPM periodically check with the agencies to ensure that the veterans' reemployment rights are being protected? Or are you just called in when it has gone to the point where someone feels aggrieved and they've started litigation, or at least you are notified of the grievance perhaps by counsel or some indirect means? Do you wait until something happens, or are you out there aggressively promoting it and encouraging it?

Mr. CURTIS SMITH. We're out there promoting it. As I said in my testimony, we have redone the whole regulatory and instructional guidance on all of this, and we are preparing a pamphlet to make sure everybody understands this and its importance and how it should work.

On the litigating appeals end, we do, in fact, as you described, come into it when there is a problem. And not many problems are brought to our attention outside of those individuals who think they need to go to the Merit Systems Protection Board to protect their interests.

Mr. RIDGE. Okay.

Would you please respond to the Naval Reserve Association's assertions that OPM has disclaimed its responsibility to enforce the veterans' reemployment law in the Executive Branch of the Federal Government, and that no Federal agency assists a Federally-employed veteran or reservist in securing reemployment rights? I'm asking you to respond to that because I have got to leave as soon as you are done testifying and I won't be able to ask you privately.

Mr. CURTIS SMITH. Okay. I think what has happened, according to what counsel tells me, is that the Civil Service Reform Act split the old Civil Service Commission into two pieces—us and MSPB—and assigned this function to the Merit Systems Protection Board.

As a separate action, the Congress was cleaning up all the places in the law where the old term "CSC" appeared, and uniformly substituting OPM where CSC had been before.

Because of that, the title 38 reference is to OPM in this connection. The problem for us is that that was kind of clean-up mechanical legislation, and the substantive consideration of the problem assigned it to Merit Systems Protection Board. That's how we have operated since CSRA, and there has been no problem at all on the Board's side in accepting its obligation to hear these appeals and assist these employees.

Mr. RIDGE. Would it be accurate to categorize your view of your responsibility as one that is more informational than anything else?

Mr. CURTIS SMITH. Yes, that would be correct. We are informational, and we are interested. These things seem important to us. We are a part of the Federal Government, as well, and understand the importance of that, so we probably preach. But it is that kind of a role.

Mr. RIDGE. Thank you very much.

Mr. CURTIS SMITH. Yes.

Mr. DOWDY. Does the minority counsel have any questions?

Mr. SMITH OF NEW JERSEY. No, Mr. Chairman.

Mr. DOWDY. All right. Thank you very much, Mr. Smith, for your appearing before us this afternoon.

Mr. CURTIS SMITH. Thank you.

Mr. DOWDY. Our last witness today is Capt. J. Robert Lunney, representing the Naval Reserve Association.

Captain, we want to thank you very much for coming and being with us today. Captain Lunney, at your convenience you may begin your testimony.

STATEMENT OF CAPT. J. ROBERT LUNNEY, JAGC, NATIONAL VICE PRESIDENT FOR LEGISLATION, NAVAL RESERVE ASSOCIATION

Captain LUNNEY. Thank you, Mr. Chairman and members of the subcommittee.

It is indeed a pleasure and an honor. Admiral Jim Forrest, the executive director of the Naval Reserve Association and I indeed wish to thank you very much for this opportunity.

You have my prepared statement, and, as I understand it, it will be made part of the record.

I would just like to comment before this subcommittee on some matters that have come to my attention in 43 years of membership in the Naval Reserve.

I have served as a staff judge advocate up in region two in New York. I have also served as an assistant U.S. attorney in the southern district of New York, and I practiced law up in New York. So what I am giving you is not a labor expert's testimony here, it is a Naval reservist, a lawyer out of New York who happened to serve on the National Naval Reserve Policy Board and served in various commands in the Navy. So I'm giving you the view from a reservist, so to speak.

As a member of the JAGC Corps—Judge Advocate General's Corps—in the Navy, which I transferred to about 15 years ago, various of these subjects, of course, came to my attention in advising commands—advising enlisted and officers.

One critical aspect of our contribution here today would be a recommendation that serious consideration be given to the Labor Department. That is: give them the subpoena power when they are out investigating a complaint by a reservist or a guardsman.

Of course, in my experience, many members of the Reserve have come forward with their complaints. We try to ameliorate it—the ombudsman, the employer support for the Guard and Reserve—but when we finally get it into the hands of the Labor Department they are dependent on a voluntary compliance. They go out and make their requests, send their letters, send their form letters, etc. It depends on the "voluntariness" of the employer.

Give them that subpoena power. They may not have to use it initially, but at least give them that clout. Give them the two-by-four to get the attention of that employer if there is no voluntary compliance with the documentation and the availability to speak to witnesses and to find out what the real facts are.

Secondly, what I have found—this, again, is personal experience of being in the Reserve and being a JAGC officer in the Reserve—is that referral by the Department of Labor to the Department of Justice is just another bureaucratic overlay and, in fact, is more delay.

The reservist—and I'm talking about the big Federal districts, and my experiences are really out of New York City and southern district of New York. I spent five years in that office as an assistant U.S. attorney, not dealing with these matters, but I can give you the sense of a young prosecutor in a Federal prosecutor's office when an enforcement comes in for some veteran in regard to his job. I'd be frank with you and say that many times those kinds of files get to the back of the heap.

The idea of referring—and I think there is a test, even, before it can be referred by the Labor Department to the Justice Department—to say the Justice Department and the U.S. attorney must be reasonably satisfied. So there's another test there.

I would suggest that serious consideration be given to giving the Labor Department the right to initiate when needed to prosecute as a special assistant U.S. attorney, or give them—their attorneys—access to the U.S. attorney's office or to the courts to handle these matters, as opposed to putting it through the Justice Department.

Those are two ideas.

We would suggest, too, that the Labor Department provide legal counsel to the reservist or guardsman if he has got to initiate anything in the Federal court, and not necessarily depend on the U.S. attorney's office. Or, if the Labor Department counsel is not immediately accessible to the Federal court to assign that Labor Department lawyer to that individual, to assist him in the Federal court.

We would also like for consideration to be given to making it clear that declaratory or injunctive relief be made available to the reservist prior to taking that risk where the employer says, "If you go on that active duty for training, you may not have a job when you come back."

The only way he can test that is to go on the active duty, then come back, and if he has lost his job he has got a lawsuit.

We would suggest that injunctive relief or preliminary relief be set forth in some proposed legislation so that you can not have to risk going on the active duty and then coming back and finding out whether you lost a job or not.

Again, with the Office of Personnel Management—as some members of this subcommittee have already commented on—I've had Federal employees coming to me telling me they felt like they were second-class citizens working for the Federal Government.

We, in the private sector, seem to have had greater rights and remedies under the Veterans' Reemployment Rights Act, because they had no recourse. If they do get before the Merit Systems Protection Board there is no counsel provided for them, they have to provide their own attorneys. There is no machinery there to affect their rights and remedies even though they have a grievance that could be heard before the Merit Systems Protection Board.

Finally—and maybe this is not the most important one, but when it has impact on you it is the most important one—in New York City I've gotten many inquiries from FBI agents. It is something maybe this committee could look into. The Federal Bureau of Investigation has a blanket rule: all special agents are key employees, and, therefore, they cannot participate in active duty for training.

Many agents came to me in New York City when I was a staff judge advocate in region two complaining about this.

We would suggest that maybe espionage, counter-espionage, and other key areas in departments within the bureau may come within the key employees, but every single agent we feel is unfairly deprived of an opportunity to engage in these Reserve affairs.

Thank you.

[The prepared statement of Captain Lunney appears on p. 60.]

Mr. DOWDY. Thank you very much, Captain Lunney.

First, I want you to know I fully agree with you that the current wording of the VRR provisions is difficult to understand. I have gathered that from your statement in your written, prepared testimony. I assure you we will welcome the recommendations of the inter-agency task force regarding streamlining chapter 43 of title 38.

In his testimony Secretary Shasteen expressed concern that the success rate of the hiring discrimination cases does not match that for other VRR provisions—the hiring discrimination. Do you think

that the fact that DOL does not have subpoena authority may have contributed to this situation?

Captain LUNNEY. I don't know whether it has contributed to it or not, but without the teeth of the subpoena power—for example, when I have counselled reservists and referred them to the Department of Labor, many times it is like a year later and the investigation is still going on.

So as to whether a person who has been denied employment, as I understand it, in the hiring process, certainly by the time it gets into the machinery of a bureaucracy he might just as well have gone and gotten another job.

With that subpoena you can get out there and lay that on the employer, and when an employer has got a subpoena served on him where he has got to respond on a day certain with the documentation, with the witness, appearing, and testifying, then they know the government means business.

I would, indeed, think it would be very helpful not only in their hiring complaints, but in the firing complaints, as well.

Mr. DOWDY. Captain, are you satisfied with the outreach being done to employers and Selected reservists regarding the VRR provisions? Can you suggest any specific ways where we could improve the outreach?

Captain LUNNEY. I think in this area everything can be improved. Where and how we can do it internally, I would think that if we gave instructions to every DOD department and agency and commission to make sure that all of their commands know that this is a Department of Labor function—I would say this: any time I have ever dealt with the Naval Reserve Command they are in total confusion until they finally get to a lawyer that looks into it and finds out the Navy has got nothing to do with this, but it has got to go to the Department of Labor.

For some reason, many commands have no idea that that's where the ultimate responsibility is.

The poor reservist or guardsman doesn't think of the Department of Labor. He thinks it is a military problem and he goes to his command. It sort of filters around.

If we could get that message out loud and clear that the Department of Labor are the people that should be involved initially, I think that would be very helpful.

Mr. DOWDY. Captain, on page 4 of you testimony you recommend that the VRR law be amended to make clear that declaratory or injunctive relief would be available to the reservist when an employer objects to the employee's absence or military training. Would you expand on this, please, for the subcommittee?

Captain LUNNEY. Right now the only way, as a practical matter, that the poor reservist or guardsman can test the law is after he is under a threat, coercion, or duress by the employer. He should not have to go to training and find that he does not have a job when he comes back.

We feel that it is appropriate to make clear that there is an effective program, judicial relief—call it what you want—to go in initially before the training to enjoin the employer from firing him if he goes away, or to obtain a declaratory judgment that he has a job if he goes away. The poor reservist should not be put in jeopardy

by going away with a mortgage, wife, and family at stake. We all know pretty much where he is going to come down. He gets out of the Reserve program, or he doesn't fulfill his duty.

So we're suggesting to maybe give him a right or a remedy to get that resolved before he takes the risk.

Mr. DOWDY. Counsel for the minority?

Mr. KINGSTON E. SMITH. No questions, Mr. Chairman. But the Naval Reserve Association should certainly be commended for its very thought-provoking testimony.

Members on the minority have already pursued some of the questions raised.

Thank you for your testimony.

Captain LUNNEY. Thank you.

Mr. DOWDY. Thank you very much, Captain Lunney.

I want to thank all of you for being present today. The information you have provided will be very helpful, and I can assure you it will be carefully reviewed.

No further business, then the subcommittee stands adjourned.

[Whereupon, at 3:26 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

OPENING REMARKS OF
HONORABLE CHRISTOPHER H. SMITH, NJ
SUBCOMMITTE ON EDUCATION, TRAINING, AND EMPLOYMENT
HEARING ON REEMPLOYMENT RIGHTS
JULY 13, 1988

Thank you Mr. Chairman. Mr. Chairman, I appreciate your initiative and efforts in setting up this hearing today to review reemployment rights for members of the Armed Forces. As I am sure the testimonies of our witnesses will indicate, reemployment rights effect not only the individuals in today's All Volunteer Total Force but it is also an issue vitally important to the security and preparedness of our nation's military.

Over the past few years, Reserve forces have grown substantially as emphasis has shifted from the Active to the Reserve component of the Armed Forces. As a result, the defense of our nation is largely dependent upon reservists who train and serve with the Armed Forces when required, but otherwise maintain full time jobs. Obviously, cooperation from the reservist's employer is essential to enable the reservist to serve his or her country.

Employers failing to comply with the existing reemployment laws impair our nation's ability to maintain a ready and able military. An employer who penalizes the reservist for his or her military obligations away from work is harming both the individual by creating conflict at the workplace and the military by making it difficult for an employee to participate.

Laws specifying reemployment rights are intended to combat these potential conflicts and enable the serviceperson to concurrently maintain their employment and military status. Our Subcommittee understands that there is some concern regarding the clarity and appropriateness of current law regarding reemployment rights. I look forward to hearing what you all have to say regarding this issue and thank you for your interest.

STATEMENT OF DONALD E. SHASTEEN
ASSISTANT SECRETARY FOR
VETERANS' EMPLOYMENT AND TRAINING
BEFORE THE
SUBCOMMITTEE ON EDUCATION,
TRAINING AND EMPLOYMENT
OF THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

July 13, 1988

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear today to testify on the administration of the Veterans' Reemployment Rights (VRR) program, Chapter 43, Title 38 of the United States Code and on the effectiveness of the provision in Public Law 99-576 which prohibits discrimination in employment because of an individual's status as a member of a reserve component of the Armed Forces or as a member of the National Guard.

As you know, the reemployment rights concept was enacted into law as one of the compulsory features of the Selective Training and Service Act of 1940 and has been amended periodically to extend reemployment rights to veterans, whether they were enlistees or inductees, and to reservists returning from basic and training duty. During its 48 year history, the VRR statute has helped thousands of veterans and reservists by ensuring that they did not lose either their jobs or job related benefits because of military service to their country.

In 1983, the responsibility for administering the VRR program was transferred, within the Department of Labor (DOL), from the Labor-Management Services Administration (LMSA) to the Veterans' Employment and Training Service (VETS). After this transfer, the VRR program was initially continued as an independent operational unit within VETS, both in the field and in the National Office. Several years ago, the National Office component - the Office of Veterans' Reemployment Rights (OVRR) - was merged with the program office to create a new Office of Veterans' Employment, Reemployment and Training (OVERT). Last year VETS also reorganized its field structure to incorporate the separate VRR positions to improve the overall services provided to veterans and to maximize the use of our available staff

resources. Under this reorganization all VETS field staff are now available to provide VRR services.

Prior to implementation of this reorganization, intensive training was provided to VETS field staff enabling them to both process VRR cases and provide the full range of services to which veterans are entitled from programs administered by VETS. Specifically in regard to the VRR program, this enabled VETS to make VRR services available nearer to the veteran's or Guard or reserve member's home because of the geographic dispersion of our 241 field staff -- compared with only 22 previously available as designated "VRR agents." We expect that as the field staff becomes more competent in VRR case law, this will also result in more timely service and quicker case decisions.

For the period beginning October 1983 through March 1988, VETS has opened 7,645 VRR cases. This averages around 1,600 to 1,700 cases per year. Attachment 1 provides detailed caseload figures for the past four and one-half years. I would like to point out that traditionally more cases are filed in the second half of the fiscal year. Therefore, we expect the final new case count for FY 1988 to continue at the same level as in past years. Ninety-four percent of the cases have been resolved favorably for the claimant -- I repeat -- 94%. During this same period, we have recovered more than $7.5 million in back wages for veterans and Guard and reserve members through negotiated settlements with the employer and through litigation on cases referred to the Department of Justice. Excluding one very large settlement of a case litigated in 1985, during this period we recovered about $2.00 through our conciliation efforts to every $1.00 recovered through litigation. We are very proud of that record.

Moreover, many more persons have been helped through the technical assistance efforts of our field staff. Frequently, once the employer fully understands the provisions of the VRR law, a satisfactory solution is found to resolve the complaint without a formal claim being filed. Unfortunately, these kinds

of settlements are not reflected in the caseload statistics I am providing. While VETS does not get to tally impressive caseload numbers through this informal process, clearly it is the preferred way to assist veterans in the enforcement of the VRR provisions.

Regarding VETS' VRR caseload, one of my ongoing concerns has been how quickly we resolve a case once it has been opened. We call this the "lapse-time" -- the time between when a case is opened and when it is closed. This figure does not include the time required to litigate a case for those cases which are referred to the Department of Justice. The standard we are striving to achieve in average case lapse-time is 120 days. During the first two quarters of FY 1988, the average case lapse-time was 135 days. This is up from an average of 126 days in FY 1987. However, the reason why the average time to close a case has risen is that this year we have focused management attention on adjudicating all unresolved VRR cases over one year old. VETS began the fiscal year with 593 cases that already were, or would become by September 30, 1988, one year or more old; as of June 30, we have been able to reduce this number to only 76 cases. By continuing our management emphasis in this area, I fully expect that the remaining 76 cases will be resolved before the end of the fiscal year.

In order to present the complete picture of the VRR program as it is today, it is also necessary to examine those cases which we cannot resolve informally or through negotiation once the claim has been filed with VETS, and which ultimately must be referred to the Department of Justice (DOJ) for litigation. During the past four and a half years we have referred approximately 200 cases to DOJ. While I do not have precise information to share with you as to how long it takes to litigate the average case referred to DOJ, clearly this process is measured in years rather than months. Over the last four years, the average number of cases in litigation has been around 120.

Let me briefly explain the process. In order for a case to be referred for litigation, the claimant must make an initial request for litigation to VETS. Normally this occurs after VETS has investigated the case, and attempted unsuccessfully to conciliate the matter with the employer. Upon receipt of the written request, VETS' field staff then prepare a memorandum of referral. Essentially, this is a factual history of the case, summarizing the legal issues and the Agent's recommendation for resolution. The case is next transmitted through the Regional Office to the National Office for review. Upon concurrence by the National Office, the case is referred to the Regional Solicitor's Office from which it is finally referred to DOJ. At this point, the Department of Labor no longer controls the case and cannot influence whether the case will be filed in District Court or the time required to resolve it, if filed. I might point out that, while litigation may not result in a speedy disposition of VRR cases, it certainly is a necessary process -- both to provide ongoing interpretation of the law and to provide a deterrent sufficient to encourage conciliation.

In October 1986, Public Law 99-576 was enacted, prohibiting discrimination by employers in initial hiring because of an individual's status as a reserve member of the Armed Forces or as a member of the National Guard. In FY 1987, the first year in which this law was effective, only 19 cases were filed. We have nearly doubled this number of cases (to 34) during the first two quarters of FY 1988. We believe that the number of cases under this provision will undoubtedly continue to increase as we pursue our outreach efforts, providing information to members of the Guard and reserve as to their rights. I am sure that you can appreciate that discrimination cases by their very nature are more difficult to establish. For example, of those cases resolved to date, only 36% of the claimants have been placed in employment or have obtained settlements in lieu of employment. This concerns me. Compare this to 94% successful resolution of

other VRR cases. To ensure that the VETS staff are able to investigate these cases effectively, I have directed that special emphasis concerning this provision of the Act be given in our training which we provide to our field staff.

While I can say that VETS' record in its administration of the VRR provisions has been good, I am not completely satisfied and do not believe that we can rest on past laurels. For this reason, I have directed that several very specific management actions be undertaken to improve not only our immediate performance, such as to ensure more timely processing of cases, but also to foresee the long-range needs of the VRR program.

The first of these actions took place exactly one year ago, July of 1987, when we established an Interagency Task Force to review the VRR law and make recommendations for needed changes. Since the 1940s many provisions of the VRR statute have become outdated due to dramatic changes in the defense manpower structure and changes in the workforce which could not have been foreseen. These changes range from an increased reliance on, and new roles and missions for, the reserve components (who file approximately 60% of the VRR claims) to new and complex vehicles for providing long term benefits to employees. The result of these changes in the Act has been confusion and frustration for both employers and persons protected by the statute. Moreover, the Act even as amended depends almost wholely upon employer voluntary cooperation or expensive litigation. We believed a change was needed. I am pleased to say that the Task Force has completed its initial work and has provided us with initial recommendations for both changes to the statute and administrative action that VETS can take. VETS is now in the process of meeting with both DOD and DOJ to further refine the Task Force's recommendations and to flesh out a legislative proposal. We anticipate that we will be able to make recommendations to the Secretary within the next few weeks concerning specific changes in the VRR law which we would like to seek.

89-164 O - 88 - 3

Secondly, I have directed the attention of VETS management to focus more clearly on VRR in FY 1988. As I have already indicated, we have established the goal of eliminating all cases more than one year old and are well on our way to achieving this objective. We have also incorporated specific VRR performance standards into our field managers' merit pay contracts. This is not enough. I am particularly concerned that as we emphasize increased productivity in the VRR program that we do not sacrifice, but instead increase the quality of service provided through the VRR program. Accordingly, by the end of the fiscal year we will have completed a quality control review of the VRR work performed in each region through a sampling of their closed cases.

The third management action which we have taken which we expect will have a positive impact on our ability to manage the VRR program is the design, development and implementation of an integrated Management Information System. We undertook this effort just over a year ago, and we will begin implementation during the first quarter of FY 1989. This new system, which we call the Veterans' Information Management System (VIMS), should greatly reduce the data entry burden on the field staff, and improve the quality and timeliness of information available both to Regional as well as National Office managers.

We believe this initiative, coupled with those already mentioned, should enable VETS to make significant strides in ensuring that all veterans are fully protected by the provisions of the VRR act. Thank you for the opportunity to discuss the VRR program with you, and I would be pleased to answer any questions you may have.

Veterans' Reemployment Rights
Statistical Summary

National Caseload Totals	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988**	TOTALS
Carried Over	419	542	672	572	593	N/A
Cases Opened	1,771	1,982	1,825	1,500	567	7,645
Cases Processed	1,648	1,852	1,925	1,479	628	7,532
Cases Pending	542	672	572	593	532	N/A
Cases to Department of Justice	54	40	34	51	24	203
Cash Recovery (Compliance)	$ 450,569	$ 691,276	$ 867,732	$ 730,927	$ 384,737	$3,125,241
Cash Recovery Litigation	793,944	3,293,473*	260,603	102,451	20,137	$4,470,608
TOTALS	$1,244,513	$3,984,749	$1,128,335	$ 833,378	$ 404,874	$7,595,849

* FY 1985 contains the Conrail settlement of $3 million.

** Through second quarter.

Attachment 1

Profile of 4,032 VRR cases closed in Fiscal Years 1986 and 1987 and 1st and 2nd Quarter of FY 1988:

By issue:

	TOTAL NUMBER OF ISSUES	PERCENT
Reinstatements	1,859	38
Seniority, Status, Pay	1,350	27
Discharge	962	20
Other Fringes	315	6
Vacation	192	4
Pension	192	4
Initial Hiring	53	1
	4,922	100

Some of the VRR cases had more than one issue involved.

By Category:	TOTAL NUMBER OF CASES	PERCENT
Veterans	1,452	36
Rejectees/Others	134	3
Reservists/Guardsmen	2,446	61
	4,032	100

Of the above figures, about 268 cases (6%) came from States or their political subdivisions.

Attachment 2

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

JUL 18 1988

Kingston Smith, Esq.
Minority Deputy Counsel and Staff Director
Subcommittee on Education, Training and Employment
Committee on Veterans Affairs
House of Representatives
333A Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Smith:

On Wednesday, July 15, 1988, during your subcommittee's hearing on the Veterans' Reemployment Rights (VRR) law, Congressman Chris Smith asked me how many VRR cases have been referred to the Department of Justice (DOJ) for filing and how many of those cases were filed in court. I did not have that information at the time, and I promised to provide the information in writing after conducting the necessary research.

Between October 1, 1983 and June 30, 1987, the Department of Labor (DOL) referred 159 VRR cases to DOJ with positive recommendations, and from our records it appears that the various United States Attorneys filed or took other favorable action on 119 of those cases, or 75%. When I say "took other favorable action", I mean that a settlement was obtained in which the veteran or reservist received something of value. Many United States Attorneys contact the employer's attorney before filing suit, giving the employer another opportunity to settle the case.

Our response to Congressman Smith's question is based upon the best information available to the Department of Labor. If you desire further information, please let me know.

Sincerely,

John F. Depenbrock
Associate Solicitor

STATEMENT OF
THE ASSISTANT SECRETARY OF DEFENSE
FOR RESERVE AFFAIRS

HON. STEPHEN M. DUNCAN

HEARING BEFORE THE COMMITTEE ON VETERANS AFFAIRS
SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 13, 1988

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
COMMITTEE

Mr. Chairman, Members of the Committee: I thank you for this opportunity to appear before you today to offer my views on the subject of reemployment rights for members of our National Guard and Reserve forces. The subject of civilian employment protection for the over 1.6 million Ready Reservists is one of great significance to our nation as we attempt to meet our national security commitments around the world with an All Volunteer Total Force and at a time of severly constrained defense budgets. Before I address the specific issues which are being considered today, however, I would like to briefly discuss the background of those issues.

As a general proposition, of course, the law regarding reemployment rights establishes a right to reinstatement to pre-military service employment for persons who perform such service. Although the specific eligibility requirements and entitlements of those who are protected by the law vary greatly, the law is designed to eliminate disadvantages in civilian employment which would otherwise work as disincentives to military service in the National Guard or Reserves. In the case of the Reserve components, the law includes prohibitions against discrimination in employment, and most recently, prohibitions against discrimination in initial hiring.

Reemployment protections were first enacted in 1940. Separate statutes established such protection for Reservists who were then on active duty and for draftees. As new crises or

perceived needs occured over the years, statutory provisions tailored to each situation were added. Coverage for volunteers followed Pearl Harbor. The first protections for Reserve training duty came during the Korean War. Extensions of the scope of permissible active duty followed the construction of the Berlin Wall and the Cuban Missile Crisis, and the protections against Reserve discrimination are associated with the war in Vietnam.

When the first statutory protections were enacted, a then novel system of enforcement was created. United States Attorneys were authorized to file suit on behalf of returning local servicemen who had been denied reinstatement by their private employers. Assistance in exercising these rights was available from the Selective Service. Following the end of the World War II draft, the responsibility for providing assistance to servicemen was transferred to the Department of Labor.

Since the introduction of the All Volunteer Total Force, the importance of employment protection for the Selected Reserve (i.e., those members of the Ready Reserve who attend regular training drills and annual active duty for training) has increased substantially. The growth of the National Guard and Reserve forces, the changing role of our Reserve forces, and the training associated with this growth and change, have increased the frequency and length of the absences of Reservists from the work place. For most Reservists and their employers, such

absences are accommodated without resort to the reemployment rights law, and many employers afford their employee-Reservists rights and benefits which are in excess of the minimum requirements of the law.

It is important to understand how our military manpower has changed under the All Volunteer Total Force, especially under this Administration. While the manpower strength of the Active forces has been reduced since 1973, the strength of our National Guard and Reserve forces has increased significantly. Since 1980, the net growth of our Reserve forces has been in excess of 300,000. Our national security policies have placed unprecedented reliance on the Reserve components. Currently, over one-half of the military manpower in the Army is in the Army National Guard and Army Reserve. The Air National Guard and Air Force Reserve operate over one-third of our tactical fighters, over one-half of our tactical reconnaissance aircraft, three-quarters of our strategic air defense fighters, nearly two-thirds of our airlift and one-quarter of our air refueling capability. All of the aerial resupply for the Navy within the continental United States is provided by the Naval Reserve. Some 88 percent of the Navy's minesweeping capability is in the Naval Reserve, as is 68 percent of the Naval Construction Units. The Marine Corps Reserve provides one-quarter of the combat forces of the entire United States Marine Corps. These facts demonstrate the absolutely essential role of the Reserve components in our military force structure.

This year we will send more than 95,000 National Guardsman and Reservists overseas for training in 46 countries. Their training activities will range from bridge and road building in Central America to providing air defense in Europe. Participation in such training improves skills and boosts morale, because it is realistic and it exposes Guardsmen and Reservists to challenges which they would actually encounter if mobilized.

In addition to realistic training, we have increased the flow of modern equipment to the Reserve forces. Many National Guard and Reserve units, for example, have received or are assigned to the new M1 Abrams Tanks, F-15 and F-16 fighter aircraft, modern Perry class fast frigates, and other advanced weapons systems. Training with such systems is critical to success in war and the training often requires absences from regular employment.

National Guardsmen and Reservists often perform important peacetime defense missions as a by-product of their training for war. Naval Reservists are presently serving with the crews of the minesweepers and other ships which are deployed to the Persian Gulf, just as others served aboard USS NEW JERSEY (BB-62) off the coast of Lebanon. Air force Reserve and Air National Guard crews flew refueling missions for the bomber aircraft which struck the retaliatory blow in Libya. Air Force Reserve crews airlifted students from Grenada and an Army Reserve Civil Affairs

unit helped restore order in that small island country. Air National Guard pilots routinely fly missions to intercept Soviet bombers just outside U.S. continental air defense zones. Marine Corps Reserve in-flight refueling aircraft routinely support Active component tactical aircraft flying worldwide, and when the President directed an urgent training deployment of 3,400 soldiers to Honduras in March, 1988, the first transport aircraft were flown by Air Force Reserve and Air National Guard crews.

In the event of war, the United States would not have the luxury of months of preparation as we had at the beginning of World War II. Our Reserve forces, like our Active forces, must be prepared to respond immediately. Our reliance on the Reserve components requires that they be manned, equipped and trained at levels close to wartime requirements.

We currently have about 1.2 million people in the Selected Reserve. While only modest growth is anticipated over the next few years, we will still need to replace those who are expected to leave the National Guard and Reserve. We will need to recruit about 240,000 people in each of the next two years. Of course, recruiting and training new people costs money. It takes approximately $15,000 to train a basic infantryman, and more than $300,000 to train a pilot. If we could retain more of the people who leave the National Guard and Reserve each year, we could save large sums in recruiting and training costs. We would also be able to maintain a higher degree of readiness.

Recent surveys indicate that more than two-thirds of the losses from the Reserve components each year are the result of family or employer conflicts. Thus the relationship between an employer and his Guardsman/Reservist-employee is very important. America has increasingly placed its security in the hands of volunteer National Guardsman and Reservists. Employers need to know that. The law protecting the employment and reemployment rights of our Reservists needs to adequately reflect that.

High personnel turnover (which includes both programmed and unprogrammed losses) is a persistent characteristic of the Selected Reserve. The majority of programmed losses (often referred to in terms of retention or reenlistment rates) occur at the end of a term of enlistment, when an individual either chooses not to reenlist or is denied reenlistment. Programmed losses are predictable and desirable. They assist us in maintaining an appropriate mix of age and experience and such losses contribute to the creation of opportunities for advancement for junior personnel.

Unprogrammed losses (often referred to as "attrition") occur when members fail to complete their Selected Reserve enlistment contracts. These losses have been a chronic and costly problem in the Selected Reserve. Minimizing attrition in the Selected Reserve is one of our greatest challenges. Attrition reduces the effectiveness and readiness of Reserve units. Furthermore, it

causes personnel turbulence which adversely affects training within units. It is a loss of the entire investment in training, and results in additional costs to train replacements. The following table summarizes the estimated average costs of the recrutiment and training new members of new the Reserve components.

RESERVE COMPONENTS
AVERAGE REPLACEMENT COSTS PER PERSON

	Recruiting	Basic Training	Technical Training	Total
Army Components	$ 2,100	$ 4,879	$ 9,521	$16,500
Navy	3,193	3,126	2,401	8,720
Air Components	1,673	4,852	13,660	20,185
Marine Corps	4,000	4,100	4,900	13,000

The Department of Defense has developed and is maintaining a broad and balanced recruiting and retention program. Since 1981, the full-time recruiter force has been expanded by 30 percent. Advertising has increased 80 percent. The funding of enlistment and reenlistment bonuses has been increased by more than 120 percent. The New GI Bill provides up to $140 a month for undergraduate studies and is a tremendous success thanks in great part to the support and leadership of this Committee. Financial assistance is being provided to officers in educational programs in critically short medical specialties. Health care benefits have been extended to Reserve component members who are disabled while in training. The Employer Support program has been

expanded to include more than 3,500 volunteers. We now need to focus our efforts on the effect of employers on recruiting and retention -- especially retention.

Pressures applied by employers account for 30 percent of the unprogrammed losses in the Reserve components. This figure has remained relatively constant over time. A number of measures have been taken to address the situation, and to some degree, the measures would have to be considered effective, since the attrition rate has not increased in spite of additional training and mission requirements. During the same period of time, the number of claims filed by Reservists with the Department of Labor has increased.

Generally speaking, two primary factors limit the support of individual National Guardsmen and Reservists which is so necessary. First, employers and the public at large are generally uninformed about the substantial sacrifices made by volunteer Guardsmen and Reservists and about their importance to our Nation's defense under the Total Force Policy. Second, there remains a persistent myth about the nature and quality of Reserve duty which antedates the Total Force. Through our National Committee for Employer Support of the Guard and Reserve (NCESGR), we are making a concerted effort to inform employers and to substantially change these attitudes. Some of the major programs include the following:

National Advertising Program - The National Committee conducts a nationwide advertising program, with considerable public service support from The Advertising Council. Creative services are donated by a major civilian advertising agency, with the government paying only the actual costs of making the television, radio, print, and outdoor ads which promote the program. In many states, local employer support groups supplement the national effort by producing local announcements and by making personal contact with broadcasters and publishers to see that the advertising messages are publicized. The Committee counts on the good will of the Advertising Council and the media for placement of all ads; no time or space is purchased. Approximately 30 million dollars worth of free advertising is provided each year to the employer support campaign.

Military Media - We realize that some of the most articulate spokesmen for employer support are those who require that support: members of the National Guard and Reserve themselves. As a result, news of the program--fortified with suggestions of how members can secure their bosses' backing--is published for distribution to official and unofficial media serving the Guard and Reserve.

Ombudsman - National and state Employer Support Committee ombudsmen provide informal assistance, information and referral services regarding reemployment rights. A

question-answering service from the Washington, D.C. office is accessible nationwide through a toll-free, long-distance number. Questions about the law, problems with individual supervisors, and inquiries about the propriety of specific personnel practices are all addressed to the Committee's ombudsmen. The service is available to employers as well as to members of the National Guard and Reserve. At the state level, specially trained volunteers assist local employers and employees in understanding and applying the law.

Other programs of the National Committee include speakers bureaus, statements of support, State Committees for Employer Support, awards programs and personal contact.

Many of the inquiries to the National committee from drilling Guardsmen and Reservists relate to the basic requirement of the law, i.e., the right to return to work following military service. Numerous inquiries also relate to the application of other, specific provisions of the law. The provisions are complex and do not necessarily or clearly address issues relating to service in the National Guard or Reserves in the context of the Total Force. Consequently, many of the disputes which are handled by the National Committee's Ombudsmen, arise not from the underlying Reserve obligation, but from legitimate misunderstandings about which provisions of law apply to the particular duty in question and how those provisions should be interpreted.

With that background, I am now happy to respond to the Subcommittee's request to evaluate the effectiveness of that provision in Public Law 99-576 which prohibits discrimination in employment because of an individuals' status as a member of a Reserve component of the Armed Forces or as a member of the National Guard.

In calendar year 1987, the Ombudsman staff of NCESGR acted on more than 5,400 inquiries and complaints, including 27 congressional referrals and 14 responses to White House and Secretary of Defense communications. The number of inquiries and complaints is expected to top 6,000 in 1988.

An analysis of the complaints and inquiries which have been addressed by the Ombudsman Program since it was instituted in 1972, reflects that Reservists who have civilian jobs which involve weekend, swing and rotating shift work (such as Postal Service, public safety and hospital workers), continue to experience a high number of job-Reserve training conflicts. The turnover of civilian first-line supervisors and lack of employer/employee knowledge of the law are other factors which contribute to employment conflicts. The following chart depicts categories of major problems as a percentage of the total number of inquiries/complaints received by NCESGR Ombudsmen in 1987.

NCESGR OMBUDSMEN SUMMARY
CALENDAR YEAR 1987

Problem/Query	Percent of Total Contacts
Leave Request for Military Duty Denied	8
Weekend "drill" Problem	7½
Improper Reinstatement to Job	7
Pay Questions/Complaints	7
Terminated/Laid Off Due to Reserve Duty	6
Harassment (Due to Guard/Reserve Affiliation)	4
Denied Job because of Guard/Reserve Affiliation	2½

A recently noted positive trend is that some 10% of the recent contacts received from employers, labor unions and other labor interest groups, involve inquiries about how to stay in compliance with federal law in the drafting or updating of employer personnel policies. While the NCESGR data track the queries in this chart by the designated categories, we are hopeful that the Department of Labor's new management information system will provide a more precise relationship between individual inquiries/complaints and the specific sections of law which deal with employment discrimination against members of the National Guard and Reserves. NCESGR ombudsmen work closely with the Veterans Employment and Training Services (VETS), Department of Labor, in the case of private and state employees, and with the Office of Personnel Management (OPM) in the case of Federal employees. Difficult cases which cannot be speedily or amicably resolved are referred to those agencies for further action.

My office and the individual Reserve components have been working with the Veterans Employment and Training Service to

assist with the burgeoning Reserve case load, to provide guidance on Reserve programs and missions, and to provide liaison between the Department of Labor and the Department of Defense. The individual Reserve components regularly publish articles not only about employment protections for Reservists, but on such subjects as how to avoid problems with employers. We are working with the Office of Personnel Management to provide clear guidance for Federal employers and employees.

As the numbers of complaints and inquiries have risen, however, we have become aware of problems which seem to be rooted more in the law itself, than in the performance of any particular agency. Efforts to provide more and better information to Reservists and employers are hampered by the sheer complexity of the law. Changes in the law, the assumption by the Reserve forces of substantially greater responsibilities in recent years, and such factors as the increased case loads of the Courts and U.S. Attorneys, have made what was once a model enforcement scheme, cumbersome. There are several problems in this area which deserve specific note. Because of the structure of the law and because the meaning of the terms used in the statutory provisions have changed over time, there is increased risk of incorrect judicial resolution of disputes. Delays often occur in the processing of cases because issues such as discrimination are more complex to investigate and litigate, because the judicial caseload has increased substantially, and because the precedence previously afforded reemployment rights cases was eliminated in a judicial housecleaning act several years ago.

A recent concern is the judicial application of a reasonableness test which, in essence, involves an attempt to balance the values of the Reserve military obligation, against the perceived needs of the employer. The original reemployment right, i.e., reinstatement to employment following a period of lengthy military active duty, was simple and was generally a one time event. In contrast, the modern relationship between civilian employment and Reserve obligations, is complex and is often continuous. An employer who would not object to the reinstatement of an employee following a period of lengthy military active duty, might conclude that the repeated absences of a Reservist for duty and training are disruptive of the employer's work schedule and evidence of disloyalty to the employer, even though the total absence of that Reservist during a lifetime of work might not equal that of the single absence of the employee who served on active duty. As a consequence, employers might feel aggrieved by the Reservist's absence, and the law as currently written does not afford any opportunity for just relief or for the airing of those grievances. Nor does it provide for declaratory or expeditious relief short of damage to the employee such as a refusal to reinstate the employee following the training duty complained of by the employer.

The problem in the application of the various aspects of the reasonableness test, is that the law relating to reemployment rights focuses only on the employer/employee relationship, and

many aspects of the reasonableness test involve military orders, and matters over which the Reservist has little or no control. The most acute problems involve military programs for which there are shortages of trained personnel and which require lengthy training periods. Reservists who are threatened with discharge from employment if they accept orders to attend nursing programs or pilot training are faced with the difficult choice of rejecting the orders and accepting subsequent risk of termination from the Reserve component, or following the orders, applying for civilian job reinstatement, and awaiting the decision of a court as to whether the circumstances or length of their absence was reasonable. Reservists who are faced with this choice will frequently refuse the orders, and in some cases, voluntarily leave the Reserve forces.

More than 80 percent of the part-time enlisted members of the Selected Reserve and 90 percent of the officers, are full or part-time civilian employees of public and private employers. Each year they assume an ever greater share of the responsibility for our nation's defense. They must rely upon the law to set a clear standard for employer conduct so that they may perform their military duties without jeopardizing their primary livelihood.

As a result of these problems, an Interagency Task Force involving personnel from the Departments of Defense, Justice, Labor and the Veterans Administration was formed over a year ago

for the purpose of exploring solutions. Within the Department of Defense an Interservice Work Group was established to facilitate the involvement of all of the Reserve components. These groups have worked to identify issues which may require a change in the current legislation. We are approaching a final agreement on a comprehensive legislative proposal which will be staffed throughout the Executive Branch.

Mr. Chairman, this completes my statement. Thank you for inviting me to appear before this Sub-committee.

Job Rights for Reservists and Members of the National Guard

The National Committee for Employer Support of the Guard and Reserve

Reprinted by Permission of the Department of Labor Veterans' Employment and Training Service

December 1987

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
NATIONAL COMMITTEE FOR EMPLOYER
SUPPORT OF THE GUARD AND RESERVE
SUITE 414
1111 20TH STREET, N.W.
WASHINGTON, D.C. 20036-3407

OFFICIAL BUSINESS PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
DEPARTMENT OF DEFENSE
DOD-302

Third Class Mail

Almost all members of National Guard and military Reserve units take part in some type of training, whether weekend drills, summer camp or special training schools. To attend this training, reservists often have to take time off from their jobs, with absences lasting from a few hours to a few months. Federal law protects reservists against being fired or denied certain employment benefits because their military activities interfere with their jobs. The U.S. Department of Labor's Office of Veterans' Reemployment Rights administers this law and gives advice and assistance to reservists in exercising their job rights. Here are some of the questions often asked about those rights.

Q *Is an employer required to excuse a worker to attend military training?*

A Yes. Federal law (Chapter 43 of Part III of Title 38, U.S. Code) says that if a reservist requests leave to attend military training the employer must grant it.

Q *Are employees in all kinds of work covered by this law?*

A Yes. The law covers employees in private industry and employees of Federal, state and local governments. It does not apply, however, to temporary employees.

Q *Does the branch of service make any difference?*

A No. Job protection extends to members of all branches of service–both National Guard and Reserve–and to all kinds of military training as long as it is under Federal orders.

Q *When and how should a reservist request military leave? Is it permissible for the reservist to inform the employer at 5 p.m. Friday that he or she can't be in on Saturday because of training?*

A Permissible, yes. Advisable, no. Although such a request fulfills the legal requirement, it doesn't make for sound employee-employer relations. Leave should be requested as far in advance as possible so the employer can plan adequately. No particular form is required, but it is recommended that the employer be given a written schedule of training dates.

Q *May the employer demand to know exactly when the employee will return to work?*

A No. It is reasonable for the employer to want this information but sometimes impossible for the reservist to furnish it. However, the employee should try to give the employer the approximate beginning and concluding dates of training as well as the approximate travel time involved.

Q *When does the employee have to return to work after completion of military traning?*

A The employee must return to work at the start of the next regularly scheduled shift after expiration of the last calendar day necessary to travel home from training or after he or she has had reasonable time to rest.

Q *Does the employee lose the right to return to work if he or she delays reporting beyond the time prescribed under the law?*

A No. But the reservist will be subject to the employer's rules pertaining to explanations and discipline when an employee is absent from work.

Q *Is a formal application for reemployment required?*

A No. Employees away for military training are not on a formal leave of absence. Consequently, they do not require "reemployment." It is more appropriate to say that they simply return to their jobs.

Q *Is the employer required to pay the employee for time lost from work because of military training?*

A No. Some employers as a matter of policy or contract do pay for time lost because of military training; others do not. Such payment is outside the scope of the reemployment law.

Q *What if an employee is disabled during military training and is unable to perform his or her old job?*

A In most cases, disability extends the length of time an employee is allowed to return to work. If the disability turns out to handicap the employee more or less permanently, the employer still has responsibilities to the employee. Such cases should be reviewed with a representative of the Labor Department's Office of Veteran's Reemployment Rights.

Q *In addition to protection against discharge, are any other employment rights or benefits protected by the law?*

A Yes. An employee cannot be denied hiring or a promotion because of the obligation imposed by membership in a Reserve component. This means that a reservist, if as well qualified as other applicants or employees, cannot be denied promotion or advancement because of or due to military obligations.

Q *Is an employer required to rearrange a reservist's work schedule to avoid a conflict between work and military training?*

A An employer is not obliged to reschedule the reservist in order to avoid scheduling conflicts between work and military training unless such rescheduling is done for employees on other types of leaves of absence or unless such rescheduling is required as a result of employer policy or collective bargaining.

Q *If an employee must decline an offer to work overtime because of military training, must the employer make-up the lost opportunity?*

A An employer is not obliged to provide make-up opportunities to work overtime that are lost by reservists because of military training unless employees on other types of leaves of absence are provided with opportunities to make up lost overtime.

Q *How does time missed from work because of reserve military training affect vacation eligibility and value?*

A Where eligibility for vacation depends on fulfilling a work requirement, Reservist employees must perform the work to be entitled to the vacation. Where the value of vacation depends upon years of service, the reservist's vacation is determined by continuous employment and absence at reserve training is to be counted toward the value of the vacation. Because of the complexity of the vacation issue, specific questions about vacation rights should be referred to a representative of the Office of Veterans' Reemployment Rights.

Q *How long can a reservist be absent from work on active duty or inactive duty for training and still have reemployment rights?*

A The statute is silent as to both the duration and frequency of training tours which require absence from the civilian employer. In the absence of statutory limitations, it is suggested that the reservist employee be reasonable in his or her request for military leaves of absence and that training relate to military occupational specialities and to the needs of the Armed Forces.

Q *Where can members of National Guard or Reserve units get more information about their job rights or help if they feel these rights have been denied?*

A For information or assistance on their job rights, reservists should contact the nearest office of the Veterans' Employment and Training Service, Office of Veterans' Reemployment Rights, U.S. Department of Labor. There is a list of area offices at the end of this pamphlet.

Information About Veterans' Reemployment Rights and Assistance Available at These Area Offices:

(National Committee 1-800-336-4590)

Albany, NY 12240
State Office Bldg. Campus
Building 12, Room 518
Tel: (518) 457-9074

Atlanta, GA 30367
1371 Peachtree St., NE
Room 326
Tel: (404) 347-3873

Boston, MA 02203
John F. Kennedy Federal
Bldg., Government
Center, Room 506
Tel: (617) 565-2084

Chicago, IL 60604
230 South Dearborn St.
Room 1064
Tel: (312) 353-0970

Cleveland, OH 44113
Office of Veterans
Reemployment Rights
1400 West Third Street
Tel: (216) 622-3848

Columbus, OH 43216
OBES Building
145 South Front Street
Tel: (614) 466-2768

Dallas, TX 75202
525 Griffin Street, FB
Room 204
Tel: (214) 767-4987

Denver, CO 80203
600 Grant Street
8th Floor, NE
Tel: (303) 866-1114

Detroit, MI 48202
7310 Woodward Avenue
Suite 407
Tel: (313) 876-5613

Indianapolis, IN 46204
10 North Senate Avenue
Room 203
Tel: (317) 232-6804

Kansas City, MO 64106
911 Walnut Street
Room 803
Tel: (816) 374-7151

Madison, WI 53701
201 E. Washington Ave.
GEFI, Room 250
Tel: (608) 266-3110

Nashville, TN 37201
301 James Robertson
Parkway, Room 317
Tel: (615) 736-5037

New York, NY 10014
201 Varick Street
Room 766
Tel: (212) 337-2211

Oxnard, CA 93030-2124
500 Esplanade Drive
Suite 1550
Tel: (805) 485-6687

Philadelphia, PA 19106
Second and Chestnut
Streets
U.S. Customs House
Room 240
Tel: (215) 597-5032

Pittsburgh, PA 15222
1000 Liberty Avenue
Federal Building, Room 302
Tel: (412) 644-4011

Richmond, VA 23219
701 East Franklin Street
Suite 1409
Tel: (804) 786-6599

St. Paul, MN 55101
390 North Robert Street
First Floor
Tel: (612) 297-1186

San Francisco, CA 94105
71 Stevenson Street
Room 705
Tel: (415) 995-5544

Seattle, WA 98174
909 First Avenue
Room 3001 FOB
Tel: (206) 442-4831

Washington, D.C. 20001
500 C Street, N.W.
Room 108
Tel: (202) 727-3381

GPO : 1988 O - 215-855 : QL 3

U.S. Department of Labor
Program Highlights

Fact Sheet No. OASVET-86-1

JOB RIGHTS FOR RESERVISTS AND MEMBERS OF THE NATIONAL GUARD

Congress has recognized that strong, ready National Guard and Reserve forces are essential for national defense under the "Total Force Policy" and that the support of civilian employers is necessary if the services are to be able to recruit and retain National Guard and Reserve personnel and to get them to participate in training to maintain and increase their readiness. Therefore, Congress has provided certain protections for reservists and members of the National Guard with respect to their civilian employers.

The Veterans' Reemployment Rights (VRR) law provides that a reservist or member of the National Guard "shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training [drills] in the Armed Forces of the United States." The law further provides that a reservist or member of the National Guard "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

The reservist or National Guard member is required to "request a leave of absence" when his or her military drills or active duty for training will conflict with his or her civilian working hours; however, the "request" is just a notice, because the employer has no right to deny the request or to veto the timing of the military training. The timing, frequency and duration of the military training are determined by the military authorities.

The reservist or National Guard member is not required to possess written training orders at the time he or she requests a military leave of absence. Because of clerical problems within the military services, reservists and National Guard members sometimes do not receive written orders until shortly before the training is to start or even after it has started. As soon as the National Guard member or reservist is informed of the dates of the military training, he or she should notify the supervisor and request a leave of absence, even if he or she has not yet received written orders. The reservist or National Guard member can minimize the employer's inconvenience by giving the supervisor as much advance notice as possible of any anticipated military training periods.

The right to a military leave of absence applies to "inactive duty training" [drills] as well as active duty for training. Drills are normally, but not always, conducted on weekends. A reservist or National Guard member normally does not receive written orders with respect to regularly scheduled drills. He may receive a written order assigning him to a unit, and the unit establishes its own drill schedule, which may or may not be reduced to writing.

If a reservist or National Guard member receives a written drill schedule for a significant period of time, such as a fiscal year, he can write to his employer, attach a copy of the drill schedule, and request a leave of absence for each scheduled drill. An employer cannot require a reservist or National Guard member to make a separate request each month, so long as the drill schedule remains unchanged.

/// Over ///

This is one of a series of fact sheets highlighting U.S. Department of Labor programs. It is intended as a general description only and does not carry the force of legal opinion.

A request for a leave of absence can be either oral or written; however, reservists and National Guard members are encouraged to make written requests, to help avoid misunderstandings. There is no limit on the frequency or duration of military leaves of absence under the provisions of law. So long as the reservist or National Guard member receives orders for military training, his or her civilian job rights are protected.

The employer is not required to pay the reservist or National Guard member for the hours or days when he or she does not work because of military training obligations. It is unlawful to require a reservist or National Guard member to use his or her earned vacation time for his or her military training.

Upon completion of the military training, the reservist or National Guard member must report back to the civilian job at his or her first regularly scheduled shift after the completion of training and the time required for return from the place of military training to the place of civilian employment, unless his or her return is delayed by factors beyond his or her control, such as an automobile accident during the return trip. If the reservist or National Guard member is late in returning to the civilian job, without adequate cause, he or she is subject to the employer's usual sanctions for tardiness or unexcused absence.

Upon reporting back to his or her civilian job, the reservist or National Guard member must be put back to work immediately, without loss of seniority, status, or rate of pay because of the military absence. The military absence is not considered to interrupt the employee's "continuous service" status for pension purposes.

It is unlawful for an employer to discharge a reservist or National Guard member because of his or her military obligations, or to discriminate against such a person with regard to promotions or any "incident or advantage of employment." Even if the reservist or National Guard member has been guilty of some misconduct or inefficiency unrelated to military obligations, the employer cannot treat him or her more harshly because he or she serves part-time in the National Guard or Reserve.

When a person first joins the National Guard or Reserve, he or she is usually required to undergo "initial active duty training" (IADT), unless the person has previously served on active duty. During IADT, the reservist or National Guard member undergoes basic military instruction and perhaps receives some training in a military specialty.

With two important exceptions, IADT is treated exactly like regular active duty for reemployment rights purposes. After completing IADT, a person must apply for reemployment within 31 days, rather than 90 days as in the case of regular active duty. Furthermore, time spent on IADT does not count toward the four-year limitation on regular active duty. For the eligibility requirements pertaining to regular active duty, see the Department of Labor fact sheet entitled "Reemployment Rights for Returning Veterans."

In addition to performing IADT, active duty for training, and inactive duty training, reservists and National Guard members also sometimes perform regular active duty, when they are called to active duty voluntarily or involuntarily. Reemployment rights for persons performing regular active duty are described in the Department of Labor fact sheet entitled "Reemployment Rights for Returning Veterans." "Temporary active duty" (TEMAC) is considered to be regular active duty for reemployment rights purposes.

The VRR law is enforced by the Department of Labor, Veterans' Employment and Training Service. Attached is a list of the addresses and telephone numbers of the Area Agents for Veterans' Reemployment Rights. If you have any further questions, or if you desire our assistance in securing your reemployment rights, if any, you should contact the Area Agent nearest to you.

© U.S. Government Printing Office: 1989—401-529/84015

STATEMENT OF
CURTIS J. SMITH
ASSOCIATE DIRECTOR FOR CAREER ENTRY
OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON EDUCATION, TRAINING,
AND EMPLOYMENT
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

at a hearing on

VETERANS' REEMPLOYMENT RIGHTS

JULY 13, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR INVITING ME TO APPEAR TODAY TO DISCUSS VETERANS' REEMPLOYMENT RIGHTS IN THE FEDERAL SERVICE.

THE FEDERAL GOVERNMENT HAS A LONG TRADITION OF PROVIDING FAIR TREATMENT TO EMPLOYEES WHOSE FEDERAL CIVILIAN SERVICE IS INTERRUPTED BY MILITARY SERVICE, INCLUDING ACTIVE DUTY FOR TRAINING AND INACTIVE DUTY TRAINING BY MEMBERS OF A RESERVE COMPONENT OR THE NATIONAL GUARD. SUCH EMPLOYEES ARE ENTITLED TO BE REEMPLOYED IN THE POSITION THEY LEFT, OR AN EQUIVALENT POSITION IN THE AGENCY, AND HAVE ALL THE RIGHTS AND BENEFITS WHEN THEY RETURN THAT THEY WOULD HAVE HAD IF THEY HAD NEVER LEFT. THEY ARE EVEN ENTITLED TO CAREER LADDER PROMOTIONS DURING THEIR ABSENCE. AND, OF COURSE, THERE CAN BE NO DISCRIMINATION AGAINST THESE EMPLOYEES EITHER IN INITIAL HIRING DECISIONS OR IN THE LATER TREATMENT THEY RECEIVE.

TO ENSURE THAT THESE RIGHTS ARE PROVIDED, TITLE 5 OF THE UNITED STATES CODE ASSIGNS TO THE MERIT SYSTEMS PROTECTION BOARD THE RESPONSIBILITIES OF THE OLD CIVIL SERVICE COMMISSION TO HEAR ANY APPEALS ARISING FROM EMPLOYEES WHO FEEL THAT THEY HAVE NOT RECEIVED ANY OF THEIR RIGHTS UNDER THE VETERANS' REEMPLOYMENT LAWS IN TITLE 38. OPM ITSELF HANDLES ONLY CASES WHERE CERTAIN RARE CIRCUMSTANCES MAKE IT NECESSARY TO PLACE A RETURNING VETERAN IN SOME AGENCY OTHER THAN THE ONE THAT ORIGINALLY EMPLOYED THE VETERAN.

WHILE OPM DOES NOT ORDINARILY HAVE ANY INVOLVEMENT IN MSPB'S HANDLING OF VETERANS' REEMPLOYMENT CASES, WE UNDERSTAND THAT VERY FEW CASES ARISE, WHICH IS QUITE SIGNIFICANT, GIVEN THE FACT THAT FEDERAL EMPLOYEES MAKE UP A VERY LARGE PORTION OF THE RESERVES--AN ESTIMATED 15 PERCENT. THE USE OF MSPB TO ADJUDICATE FEDERAL REEMPLOYMENT CASES HELPS GET THESE CASES SETTLED QUICKLY, SINCE THEY DON'T HAVE TO GO TO COURT THE WAY PRIVATE SECTOR CASES DO.

WHILE OUR KNOWLEDGE OF INDIVIDUAL CASES IS LIMITED, IT APPEARS TO US THAT WHEN CASES DO ARISE, THEY ARE MORE OFTEN DUE TO IGNORANCE RATHER THAN MALICE. THEREFORE, IN ORDER TO EDUCATE FEDERAL AGENCIES ON THEIR OBLIGATIONS TO EMPLOYEES RETURNING FROM MILITARY DUTY, WE HAVE BEEN REVISING ALL OF OUR GUIDANCE IN THIS AREA.

WE BEGAN WITH A COMPLETE REVISION OF OUR REGULATIONS. OUR OLD REGULATIONS WERE QUITE COMPLICATED AND CONFUSING, AND OBSOLETE IN SOME RESPECTS. OUR NEW REGULATIONS, WHICH TOOK EFFECT ON FEBRUARY 16, 1988, ARE, WE BELIEVE, MUCH CLEARER AND SHOULD HELP RESOLVE ANY CONFUSION ARISING WHEN EMPLOYEES RETURN FROM MILITARY SERVICE.

WE HAVE ALSO COMPLETELY REWRITTEN OUR FEDERAL PERSONNEL MANUAL CHAPTER ON RESTORATION TO DUTY. THE FEDERAL PERSONNEL MANUAL IS OUR BASIC FORM OF GUIDANCE FOR OPERATING PERSONNEL OFFICES THROUGHOUT THE GOVERNMENT, AND THIS NEW GUIDANCE SHOULD HELP THE PEOPLE WHO ARE ACTUALLY PROCESSING THE NECESSARY PERSONNEL ACTIONS TO UNDERSTAND THEIR OBLIGATIONS TO RETURNING VETERANS AND RESERVISTS.

FINALLY, WE ARE WORKING ON A PAMPHLET FOR EMPLOYEES WHO PERFORM MILITARY DUTY, TO MAKE SURE THEY UNDERSTAND THEIR RESTORATION RIGHTS AND HOW TO EXERCISE THEM. WE HAVE BEEN CONSULTING WITH INTERESTED GROUPS ON THIS PAMPHLET, AND HOPE TO ISSUE IT SHORTLY.

WE BELIEVE THESE EFFORTS WILL HAVE A SIGNIFICANT IMPACT ON ANY REMAINING CONFUSION AMONG FEDERAL AGENCIES ON THEIR OBLIGATION TO EMPLOYEES WHO RETURN FROM ACTIVE DUTY, OR WHO ARE IN THE RESERVES OR THE NATIONAL GUARD.

THANK YOU. I WOULD BE PLEASED TO ANSWER ANY QUESTIONS.

STATEMENT BY

CAPT. J. ROBERT LUNNEY, JAGC, USNR

NATIONAL VICE PRESIDENT - LEGISLATION

OF THE

NAVAL RESERVE ASSOCIATION

TO THE

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

OF THE

COMMITTEE ON VETERANS' AFFAIRS

13 JULY 1988

MR. CHAIRMAN, DISTINGUISHED MEMBERS OF THE COMMITTEE, IT IS A PRIVILEGE TO HAVE THIS OPPORTUNITY TO PRESENT THE VIEWS OF THE NAVAL RESERVE ASSOCIATION TO THE COMMITTEE FOR YOUR CONSIDERATION.

THROUGHOUT OUR NATION'S HISTORY, WE HAVE DEPENDED LARGELY UPON THE "CITIZEN SOLDIER" AND "CITIZEN SAILOR" FOR NATIONAL DEFENSE. IN THE PAST, IT WAS POSSIBLE TO ENLIST OR CONSCRIPT AND TRAIN THESE SERVICEMEN AFTER THE START OF THE WAR BECAUSE MILITARY SKILLS COULD BE LEARNED FAIRLY QUICKLY AND OUR NATION ENJOYED A BUFFER PROVIDED BY TWO GREAT OCEANS. IN THIS AGE OF COMPLICATED MILITARY EQUIPMENT, JET TRANSPORTATION, INSTANT COMMUNICATION, AND GLOBAL RESPONSIBILITY FOR OUR NATION, WE NO LONGER ENJOY SOME OF THE LUXURIES OF THE PAST. IT IS NECESSARY TO ORGANIZE AND TRAIN THE "CITIZEN SERVICE MEMBERS" DURING PEACETIME BECAUSE THERE WON'T BE TIME TO TRAIN THEM AFTER MOBILIZATION DAY.

TODAY OUR COUNTRY IS MORE DEPENDENT THAN EVER BEFORE UPON THE RESERVE COMPONENTS AND THE NATIONAL GUARD FOR ESSENTIAL NATIONAL DEFENSE READINESS. BECAUSE OF THE TIGHTNESS OF THE DEPARTMENT OF DEFENSE BUDGET, THIS DEGREE OF RELIANCE IS LIKELY TO INCREASE STILL FURTHER. BECAUSE OUR RESERVE COMPONENT PERSONNEL ARE PAID ONLY A SMALL FRACTION OF WHAT ACTIVE DUTY PERSONNEL ARE PAID, WE CAN GIVE YOU "MORE BANG FOR THE BUCK." IF CONGRESS PERSISTS IN THE EFFORT TO ASSIGN DRUG INTERDICTION RESPONSIBILITIES TO THE ARMED FORCES, STILL MORE OF A BURDEN WILL BE PLACED UPON THE RESERVE COMPONENTS AND THE NATIONAL GUARD.

WHEN IT ENACTED AND AMENDED THE VETERANS' REEMPLOYMENT RIGHTS (VRR) LAW, CONGRESS RECOGNIZED THE NECESSITY TO PROTECT THE CIVILIAN JOBS OF RESERVE/GUARD PERSONNEL IN ORDER TO MAKE IT POSSIBLE FOR THE SERVICES TO RECRUIT AND RETAIN SUCH PERSONNEL AND TO GET THEM TO PARTICIPATE IN NECESSARY MILITARY TRAINING. MOST RESERVE/GUARD PERSONNEL ARE PAID FOR THEIR DRILLS AND THEIR ACTIVE DUTY FOR TRAINING, BUT THIS IS NOT THEIR PRINCIPAL SOURCE OF INCOME. IF THEY MUST CHOOSE BETWEEN THEIR OBLIGATIONS TO THEIR CIVILIAN EMPLOYERS AND THEIR OBLIGATIONS TO THE MILITARY, MOST WILL CHOOSE THE CIVILIAN EMPLOYER BECAUSE THAT IS THEIR PRINCIPAL SOURCE OF SUPPORT FOR THEMSELVES AND THEIR FAMILIES. THE POINT OF THE VRR LAW IS TO MAKE IT POSSIBLE FOR RESERVE/GUARD PERSONNEL TO SIMULTANEOUSLY HAVE PART-TIME MILITARY CAREERS AND FULL-TIME CIVILIAN CAREERS.

SINCE THE 1950'S RESERVE AND GUARD PERSONNEL HAVE HAD THE RIGHT TO TAKE TIME OFF FROM THEIR CIVILIAN JOBS TO PARTICIPATE IN INITIAL ACTIVE DUTY TRAINING, ACTIVE DUTY FOR TRAINING OR INACTIVE DUTY TRAINING (DRILLS), AND THOSE PROVISIONS ARE NOW CODIFIED AT 38 U.S.C. §§ 2024(C) AND 2024(D). SINCE 1968, IT HAS BEEN UNLAWFUL TO DISCHARGE OR OTHERWISE DISCIPLINE OR DISCRIMINATE AGAINST AN ALREADY EMPLOYED RESERVE/GUARD MEMBER BECAUSE OF HIS MILITARY OBLIGATIONS, AND THAT PROVISION IS CODIFIED AT 38 U.S.C. § 2021(B)(3). IN 1986 CONGRESS AMENDED SECTION 2021(B)(3) TO ALSO MAKE IT UNLAWFUL TO DISCRIMINATE IN HIRING AGAINST RESERVE/GUARD PERSONNEL.

WE ARE QUITE PLEASED WITH THE LEGAL PROTECTION THAT CONGRESS HAS PROVIDED, BUT THE PRESENT WORDING IS VERY DIFFICULT FOR EVEN LAWYERS TO UNDERSTAND, AND IMPOSSIBLE FOR INDIVIDUAL RESERVISTS TO UNDERSTAND. I AM INFORMED THAT THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF LABOR WORKING ON A DRAFT OF A NEW VRR LAW THAT WOULD ELIMINATE UNNECESSARY DISTINCTIONS BETWEEN TYPES OF MILITARY TRAINING OR SERVICE AND WOULD BE EASIER TO UNDERSTAND. THE NAVAL RESERVE ASSOCIATION STRONGLY SUPPORTS THAT EFFORT.

EVEN MORE IMPORTANT IS IMPROVING THE VRR LAW'S ENFORCEMENT MECHANISM TO MAKE IT SPEEDIER AND MORE EFFECTIVE. I HAVE HEARD FROM AN NRA MEMBER IN THE CHICAGO AREA WHO WAS LAID OFF BY A MAJOR RETAILING FIRM. HE BELIEVES THAT HE WAS LAID OFF BECAUSE HIS SUPERVISORS RESENTED HIS TIME AWAY FROM WORK ATTENDING NAVAL RESERVE TRAINING, AND HE COMPLAINED TO THE DEPARTMENT OF LABOR, WHICH HAS BEEN INVESTIGATING HIS CASE FOR MORE THAN ONE YEAR. THE EMPLOYER CONTENDS THAT OUR MEMBER WAS LAID OFF FOR REASONS UNRELATED TO HIS NAVAL RESERVE OBLIGATIONS, BUT THE EMPLOYER HAS REFUSED LABOR DEPARTMENT REQUESTS TO EXAMINE COMPANY RECORDS WHICH WOULD CONFIRM OR REFUTE THE ALLEGATION. THE DEPARTMENT OF LABOR DOES NOT HAVE SUBPOENA AUTHORITY UNDER THE CURRENT VRR LAW. IT IS IMPORTANT THAT THE DEPARTMENT BE GIVEN THAT AUTHORITY SO THAT VRR INVESTIGATIONS CAN BE COMPLETED EXPEDITIOUSLY.

ANOTHER OPPORTUNITY FOR DELAY COMES AFTER THE DEPARTMENT OF LABOR HAS COMPLETED ITS INVESTIGATION AND HAS CONCLUDED THAT A VIOLATION HAS OCCURRED. IN SUCH A SITUATION, THE CASE FILE IS REFERRED TO THE APPROPRIATE UNITED STATES ATTORNEY, WHO IS REQUIRED TO FILE SUIT ON BEHALF OF THE VRR CLAIMANT IF THE UNITED STATES ATTORNEY IS "REASONABLY SATISFIED" THAT THE CLAIMANT IS ENTITLED

TO THE BENEFITS HE SEEKS. SEE 38 U.S.C. § 2022.

THE UNITED STATES ATTORNEYS AND THEIR STAFFS ARE VERY BUSY WITH ALL MANNER OF CASES, INCLUDING MAJOR DRUG CASES AND OTHER CRIMINAL CASES. A CLAIM FOR A FEW THOUSAND DOLLARS OF BACK PAY FOR A RESERVIST WHO HAS LOST HIS CIVILIAN JOB MAY NOT SEEM LIKE A HIGH PRIORITY TO A UNITED STATES ATTORNEY, BUT THE VIGOROUS LITIGATION OF SUCH CASES IS ESSENTIAL TO NATIONAL DEFENSE READINESS.

THE NAVAL RESERVE ASSOCIATION RECOMMENDS THAT THE DEPARTMENT OF LABOR BE GIVEN THE AUTHORITY TO DETERMINE WHICH VRR CASES HAVE PROBABLE MERIT AND WHICH SHOULD BE ADMINISTRATIVELY CLOSED, AND ALSO THAT LABOR BE GIVEN THE AUTHORITY TO PROVIDE LEGAL REPRESENTATION TO VRR CLAIMANTS. UNDER THE CURRENT LAW, AUTHORITY AND RESPONSIBILITY ARE DIFFUSED BETWEEN THE DEPARTMENT OF LABOR AND THE DEPARTMENT OF JUSTICE. AS YOU KNOW, DIFFUSION OF RESPONSIBILITY IS INCONSISTENT WITH ACCOUNTABILITY. PLEASE CONCENTRATE THE AUTHORITY AND THE RESPONSIBILITY IN THE LABOR DEPARTMENT AND THEN HOLD THAT DEPARTMENT ACCOUNTABLE FOR THE RESULTS.

WHEN A RESERVIST ASKS HIS CIVILIAN EMPLOYER FOR TIME OFF TO ATTEND MILITARY TRAINING AND THE EMPLOYER SAYS NO, THREATENING TO FIRE THE RESERVIST IF HE COMPLIES WITH HIS MILITARY ORDERS, THE RESERVIST SHOULD NOT BE REQUIRED TO REPORT TO MILITARY TRAINING ON THE BET THAT HE WILL WIN HIS VRR CASE AFTER HE GETS BACK. THE VRR LAW SHOULD BE AMENDED TO MAKE CLEAR THAT DECLARATORY OR INJUNCTIVE RELIEF WOULD BE AVAILABLE TO THE RESERVIST IN SUCH A SITUATION, BEFORE HE LEAVES HIS JOB TO REPORT FOR MILITARY TRAINING OR SERVICE.

THE ENFORCEMENT SCHEME DESCRIBED ABOVE APPLIES TO VRR CASES AGAINST STATE AND LOCAL GOVERNMENTS AND PRIVATE EMPLOYERS. THE CURRENT VRR LAW ASSIGNS TO THE DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT (OPM) THE AUTHORITY AND THE RESPONSIBILITY TO ENFORCE THE VRR LAW WITHIN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT. SEE 38 U.S.C. § 2023(A). HOWEVER, OPM HAS DISCLAIMED THIS RESPONSIBILITY. UNDER THE CURRENT SYSTEM, NO FEDERAL AGENCY ASSISTS THE FEDERALLY EMPLOYED VETERAN OR RESERVIST IN SECURING HIS REEMPLOYMENT RIGHTS. THE NAVAL RESERVE ASSOCIATION RECOMMENDS THAT THIS RESPONSIBILITY BE ASSIGNED TO THE DEPARTMENT OF LABOR.

IN RECENT YEARS, OPM HAS BEEN PART OF THE PROBLEM INSTEAD OF PART OF THE

SOLUTION. IN ITS REGULATIONS, OPM HAS ADVISED OTHER FEDERAL AGENCIES THAT, WHEN CONSIDERING AN EMPLOYEE'S MILITARY LEAVE REQUEST, THE AGENCY CAN CONSIDER ITS OWN WORKLOAD AND BALANCE ITS OWN NEEDS WITH THE MILITARY'S NEEDS. SEE 5 C.F.R. § 353. THIS IS DIRECTLY CONTRARY TO THE VRR CASE LAW, WHICH HAS RECOGNIZED THAT THE MILITARY TRAINING OF AN EMPLOYEE IS ALWAYS A BURDEN TO THE EMPLOYER, AND HAS HELD THAT BURDEN TO THE EMPLOYER DOES NOT JUSTIFY DENIAL OF A MILITARY LEAVE REQUEST. SEE, E.G., GULF STATES PAPER CORP. V. INGRAM, 811 F.2D 1464 (11TH CIR. 1987).

THE VRR LAW SHOULD BE AMENDED TO REQUIRE THAT OPM REGULATIONS FOR FEDERAL AGENCY EMPLOYERS BE CONSISTENT WITH LABOR DEPARTMENT RULES AND CASE LAW GOVERNING STATE/LOCAL GOVERNMENTS AND PRIVATE EMPLOYERS, EXCEPT THAT THE FEDERAL GOVERNMENT SHOULD BE PERMITTED AND ENCOURAGED TO GRANT ITS OWN EMPLOYEES GREATER OR ADDITIONAL PROTECTIONS. THE FEDERAL GOVERNMENT SHOULD BE A MODEL EMPLOYER WITH RESPECT TO "EMPLOYER SUPPORT OF THE GUARD AND RESERVE." HOW CAN WE ASK THE GAS STATION OWNER IN MISSISSIPPI TO GIVE HIS EMPLOYEES TIME OFF FOR MILITARY TRAINING IF THE FEDERAL GOVERNMENT DOES NOT DO THIS FOR ITS OWN EMPLOYEES?

I AM INFORMED THAT APPROXIMATELY 10% OF GUARD/RESERVE PERSONNEL ARE FEDERAL EMPLOYEES, BUT MORE THAN 10% OF THE CALLS TO THE "EMPLOYER SUPPORT" TOLL FREE NUMBER ARE FROM FEDERAL EMPLOYEES. A GROSSLY DISPROPORTIONATE NUMBER OF CALLS ARE ABOUT THE POSTAL SERVICE OR THE VETERANS ADMINISTRATION.

FOR DECADES THE FBI HAS DESIGNATED ALL OF ITS SPECIAL AGENTS AS "KEY" FEDERAL EMPLOYEES, THUS PRECLUDING THEM FROM PARTICIPATION IN THE GUARD OR RESERVE. THIS IS AN ABUSE OF THE "KEY EMPLOYEE" PROGRAM. CERTAINLY, THOSE FBI AGENTS WHO ARE DIRECTLY INVOLVED IN COUNTER-INTELLIGENCE OR COUNTER-ESPIONAGE SHOULD BE DESIGNATED "KEY" EMPLOYEES, BUT DESIGNATING ALL AGENTS IS INDEFENSIBLE.

THANK YOU FOR YOUR ATTENTION TO THIS SERIOUS PROBLEM FOR RESERVE COMPONENT READINESS, AND THANK YOU FOR GIVING ME THE OPPORTUNITY TO TESTIFY HERE TODAY. IF YOU HAVE ANY QUESTIONS, I WILL BE HAPPY TO TRY TO ANSWER THEM.

LBO:DS

STATEMENT FOR THE RECORD

BY

PARALYZED VETERANS OF AMERICA

BEFORE THE

SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

OF THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING

VETERANS' REEMPLOYMENT RIGHTS

JULY 13, 1988

Mr. Chairman and Members of the Subcommittee, on behalf of the members of Paralyzed Veterans of America, we are pleased to present our views on Chapter 43, title 38, United States Code, Veterans' Reemployment Rights (VRR).

Mr. Chairman, an individual's right to reemployment after service in the Armed Forces of the United States represents a most responsible provision to ensure that certain job related provisions are maintained and protected. The laws governing VVR entitlements and the procedures with which these entitlements are enforced are quite specific and clear in their intent. Existing provisions to prohibit discrimination in employment because of an individual's status as a member of a reserve component of the Armed Forces or as a member of the National Guard also represent specific and enforceable language to implement and administer these important programs.

PVA is pleased to state that, with very few exceptions, Chapter 43 has been implemented and enforced in an effective manner. PVA Service Representatives have received very few complaints from individuals who believe their reemployment rights have been violated. Even fewer are the number of cases that we are aware of involving individuals who have experienced discrimination in employment due to reserve duty or National Guard duty.

Generally speaking, when such problems exist they are usually resolved favorably before formal complaint proceedings are initiated.

Mr. Chairman, although we see no reason for fundamental change in the VVR program, we do have several concerns we wish to bring to your attention.

First, it is our understanding that although enforcement procedures are quite clear in their intent, the timeliness of the resolution of VVR cases is not at an acceptable level. Such cases frequently consume an inappropriate amount of time. We are concerned that U.S. attorneys simply have not assigned an appropriate priority to VVR cases.

Next, PVA believes that the role of the Office of Personnel Management (OPM) could be greatly enhanced in the area of reemployment rights. Presently, OPM does not provide the effective protection and enforcement with which we are familiar in the Department of Labor (DOL). A veteran seeking reemployment in federal government will not find a strong advocate in OPM. Numerous referrals between agencies are often frustrating and unproductive. An individual will quite likely be referred from the original agency to the VA, then to OPM, then back to the original agency, then back to OPM where the person will be advised to file a claim with the Merit System Protection Board. PVA does not believe this procedure affords a veteran the degree of reemployment protection that is clearly documented in Chapter 43. OPM must be an advocate for veterans seeking reemployment in the federal government and must actively enforce reemployment rights and protection. We do not believe that OPM is presently fulfilling this mission.

Finally, PVA believes that the entire VVR program would greatly benefit by increased publicity. We have some concern that many veterans are not aware of the provisions in Chapter 43 and are therefore deprived of the benefits available. We believe it would be proper for the Department of Defense, the VA, OPM, and DOL to increase and emphasize awareness of VVR.

Mr. Chairman, that concludes our testimony. We appreciate your concern for this important program and thank you for soliciting our views.

STATEMENT OF
RONALD W. DRACH
NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
TO THE
SUBCOMMITTEE ON EDUCATION,
TRAINING AND EMPLOYMENT
OF THE
COMMITTEE ON VETERANS AFFAIRS
U. S. HOUSE OF REPRESENTATIVES
JULY 13, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than one million members of the Disabled American Veterans and its Auxiliary, I am extremely pleased to present our views on Chapter 43, Title 38, U.S. Code regarding veterans reemployment rights.

Mr. Chairman, when we appeared before this Committee in April of 1986 to discuss H.R. 2798, we indicated we were basically pleased with the existing Chapter 43 implementation. In part we stated "...this is one Chapter of Title 38, U.S. Code that has, for the most part, been effectively implemented and enforced. The provisions embodied in Chapter 43 leave very little to interpretation and in those areas were interpretation has been needed the courts have generally ruled in favor of veterans".

Mr. Chairman, we very rarely receive complaints from veterans alleging their reemployment rights have been violated. This could be due in large part to the case law which tends to support the veteran's rights in this issue. It could also be attributable to the relatively minimal amount of outreach and public information efforts on behalf of the Department of Labor (DOL) and the Department of Defense (DOD) to advise soon to be discharged individuals of their reemployment rights. We believe that much more can be done both by the Department of Defense and the Department of Labor to ensure soon to be released individuals are advised of their rights under this program.

However, Mr. Chairman, we don't believe the responsibility should lie solely with DOD and DOL. The Office of Personnel Management (OPM) also has a responsibility in this program, a responsibility, Mr. Chairman, which the DAV believes has long been ignored by OPM and its predecessor agency, the Civil Service Commission. OPM does not have any special programs, provisions, or enforcement mechanisms in place to advise veterans of their rights, or to effectively assist those veterans in exercising those rights. We were recently advised by OPM officials that should such a complaint come to their attention, they would contact the agency. However, if the agency was uncooperative, OPM would tell the veteran that he or she must file with the Merit Systems Protection Board (MSPB). Mr. Chairman, we find that to be unacceptable and suggest that OPM assume more of an "advocacy role" to attempt to resolve complaints.

As you know, the Department of Labors' Office of Veterans' Reemployment Rights, under the Office of the Assistant Secretary of Labor for Veterans' Employment and Training, investigates and attempts to resolve complaints in the private sector. We believe that OPM should adopt a much more forceful enforcement role similar to that of DOL. In the event an individual must go to MSPB, OPM or the Justice Department should provide assistance and representation to that aggrieved individual. This is not at all unlike OVRR referring cases to the Justice Department for litigation.

Mr. Chairman, we have found over the years that the MSPB procedures are very legally complex and require professional representation. Cases before MSPB may be dismissed on procedural grounds and the merits are never heard.. This can happen when someone attempts to represent himself or herself before MSPB. We believe that representation should be part of the enforcement mechanism in Chapter 43.

Mr. Chairman, we do not have any strong observations on the effectiveness of Public Law 99-576. We have not had any reservist or members of the National Guard contact us. We did recently learn that while the number of complaints received by the Department of Labor have not increased, the number of "inquiries" to the National Committee for Support of the Guard and Reserves has increased by approximately 50% since the enactment of the legislation. This would indicate that perhaps more and more individuals are having problems or are just seeking clarification. Again, maybe a more effective public information and outreach program to the affected individuals would be very beneficial.

In conclusion, Mr. Chairman, with the exception of reviewing OPM's role in this program and suggesting that more effective public information and outreach be conducted, we see no need for any modifications to Chapter 43 at the present time.

STATEMENT OF MAJOR GENERAL EVAN L. HULTMAN, AUS (RET)

EXECUTIVE DIRECTOR

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

BEFORE THE

HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON EDUCATION, TRAINING

AND EMPLOYMENT

CONCERNING PL 99-576 -- 13 JULY 1988

Mr. Chairman and Members of the Committee:

Thank you for providing this opportunity to represent the many men and women from all of the Uniformed Services who are members of the Reserve Officers Association (ROA).

ROA would also like to thank this Committee for the actions it has taken in the past, not only in the area of enacting PL 99-576 which prohibits discrimination in the hiring of Reserve and National Guard participants, but also for the outstanding work you have done in providing educational opportunities for our military personnel, both active and Reserve.

As you know, ROA worked with many of you top make H.R. 2798 a reality. We supported legislation to prohibit discrimination in the hiring of Reserve and National Guard participants and we appreciate the oversight this Committee is exercising in the implementation of this legislation.;

In today's world, the Reserve forces are being called upon to assume more and more of the responsibilities associated with our nation's defense. This is being done because the Reserve forces an provide defense capabilities at a cost far less than can be provided by the active component. Budget pressures have caused and will continue to encourage a shift of responsibilities from the active to the Reserve components in an effort to get a "bigger bang for the buck". Hiring discrimination and/or the perception that Reservists and Guard members are unable to compete without prejudice in the job market would undermine the ability of the Guard and Reserve to attract and retain individuals of the quality and in the numbers needed to meet manpower needs. Failure of the Reserve and Guard to meet manpower needs results in reduced readiness or increased defense costs, or both.

Within the Department of Defense the Office of the Assistant Secretary or Reserve Affairs is responsible for Reserve manpower and continues to commit significant resources to employer support. The National Committee for Employer Support of the Guard and Reserve has established state level Employer Support Committees, involving influential members of local business and professional communities, throughout the United States. The Committees promote public information programs to increase the understanding of the role of the Reserve and Guard and the Total Force and the importance of time off for training. Rational is provided for hiring Reserve and Guard participants -- those who service their nation well make exceptionally good employees.

We recognize that employers are called upon to make sacrifices because of ever increasing training requirements of the Reserve and Guard. We believe, however, that the employment of these citizen soldiers is not without reward. We believe the same sense of duty and the same self discipline that make an individual a successful Reservist also contribute towards making him or her a good employee.

Public Law 99-576 placed in law provisions that prohibit discrimination in employment because of an individuals status as a member of the Reserve Component of the armed forces or as a member of the National Guard. This is good legislation. Unfortunately, we do not live in a perfect world and there are undoubtedly cases where members of the Reserve Components are being discriminated against in initial employment because of their military status. Part of the reason may be that many employers are not aware of P.L. 99-576's anti-discrimination provisions. Continuing education, both within the private sector and within the Reserve community, as to the provisions of P.L. 99-576 remains one of the most effective ways of ensuring members of the Reserve Components are not discriminated against in employment.

Thank you for the opportunity to present ROA's views. Your continued support of the men and women who are wearing the uniform of our country, both active and Reserve, is deeply appreciated.

United States
Office of
Personnel Management

Washington, D.C. 20415

AUG 4 1988

AUG 3 1988

In Reply, Refer To

Your Reference

Honorable Wayne Dowdy
Chairman
Subcommittee on Education,
Training, and Employment
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Dowdy:

Enclosed are my responses to the additional questions you sent, following up on the Subcommittee's hearing on veterans' reemployment rights on July 13, 1988.

Please let me know if I can be of any further assistance.

Sincerely,

Curtis J. Smith
Associate Director
for Career Entry

Enclosure

WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSE

QUESTIONS SUBMITTED BY HONORABLE WAYNE DOWDY

1. Q. Are you a member of the Interagency Task Force on Veterans' Reemployment Rights, or have you participated in their meetings and discussions regarding veterans' reemployment rights issues? If not, why not?

   A. The Department of Labor, which established the Interagency Task Force last year, has not asked OPM to be a member of the Task Force. However, in one of the meetings a member of my staff did participate informally at the invitation of a DOD representative.

2. Q. Do you have a system in place to monitor the incidence of claims from individuals who feel they have been discriminated against, or a method of tracking employer compliance with title 38 reemployment law?

   A. OPM does not have a formal system of tracking cases, since appeals of military restoration rights are handled by the Merit Systems Protection Board. However, my office does monitor all of the cases coming before the Board to ensure that decisions are consistent with law and our regulations. In general, there are very few appeals from Federal employees on military restoration rights. We attribute this to the fact that agencies generally make every effort to accommodate employees performing military duty. In fact, we do not know of a single case where an agency successfully refused to reemploy an employee who performed military duty and applied for restoration within the prescribed time period.

3. Q. Does OPM offer any guidance, assistance or counseling to a Federal employee who feels he/she has been discriminated against?

   A. We are soon going to issue an informational pamphlet on military reemployment rights to help Federal employees understand their rights in this area, and how to appeal to MSPB if they feel they have not been accorded those rights. In addition, OPM Area Offices (located in major cities across the country) offer guidance, assistance, and counseling to Federal employees who perform military duty. However, it should be noted that we receive very few substantive complaints from employees about problems with military obligations.

U.S. Department of Labor

Assistant Secretary for
Veterans' Employment and Training
Washington, D.C. 20210

AUG 15 1988

AUG 16 1988

The Honorable Wayne Dowdy
Chairman, Subcommittee on Education,
Training and Employment
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter dated July 18 regarding the membership of the Interagency Task Force of Veterans' Reemployment Rights (VRR). In your letter you ask for additional information pertaining to the hearing of July 13. Enclosed is our response to your question.

Thank you for the opportunity to further discuss the activities of the VRR program. I would be pleased to answer any additional questions you may have.

Sincerely,

David A. Norman

for DONALD E. SHASTEEN

Enclosure

Question #1. If a reservist or Guardsman feels that an employer is not complying with the law, what steps should that individual take?

If the individual's complaint has merit, what is the process from that point? For example, what is VETS' role? What is the role of the State Committees for Employer Support of the Guard and Reserve?

Answer:

The reservist or member of the National Guard should, at the very outset, inform his commander of the problem and follow his instructions in attempting to settle the problem. Many commanders will have the assistance of a volunteer member of a State Committee for ESGR who will agree to contact the employer and explain the military requirements or training duty responsibilities. Should that volunteer not be able to find agreement between the employer and the reservist, the problem, with the consent of the reservist, should be referred expeditiously to the DVET in the state since VETS has the statutory responsibility for compliance with the law.

Our relationship with NCESGR has fostered a complementary understanding of how the reemployment rights laws are to be administered. We welcome the informal assistance their volunteer ombudsmen in the states are able to provide and we both encourage and assist through educational opportunities and technical assistance the efforts of these vital volunteers. Our only requirement is that their referrals to us for formal investigation as required not be delayed unreasonably. In that regard, I want to assure the committee that we are pleased with the support the committees have provided and the level of

expertise their members exhibit in their contacts with reservists and employers.

We support the efforts of the Committee to assist us and we believe that the Committee efforts are most important to our overall outreach responsibilities.

Question #2a. In your view, do veterans who have been denied their reemployment rights now have access to prompt, speedy and inexpensive adjudication of their claims?

Answer:

Yes. However, I think that we can do a better job to improve the adjudication of their claims. As I mentioned in my testimony, the standard overall lapse-time--that is the average for all cases--we are striving to achieve is 120 days. We have established new internal controls that should enable VETS to reach this goal soon. For example, we have placed in the performance standards of our Regional Administrators resolution of 80% of new cases within 90 days of receipt. Veterans and reservists need not incur any expenses in regard to their reemployment claims as the government pays all investigation and litigation costs. In a few cases, persons do hire their own legal counsel, as provided by the enforcement provisions of the law, and pursue their claims independently through Federal district courts.

Question #2b. Do you support the establishment of new adjudication procedures and, if so, what sort of structure would you recommend?

Answer:

In regard to the establishment of new adjudication procedures, VETS is now in the process of meeting with DOD and DOJ to further refine the Task Force's recommendations and to flesh out a consensus legislative proposal. As I mentioned in my statement, we anticipate that we will be able to make recommendations to the Secretary within the near future concerning changes in the VRR law.

Question #3. In your view, are Federal employees who are members of the Select Reserve currently provided adequate protection and assistance in the event they have a complaint? What steps can be taken to improve the process remedy to Federal employees?

Answer:

Federal employees must complain to the Merit Systems Protection Board utilizing their own private counsel. Our staff, by precedent and practice does not have jurisdiction under the current statute to intervene in these cases--either to investigate or to attempt conciliation. This has traditionally been viewed as an OPM responsibility.

Our recent Interagency Task Force has discussed this issue at great length, and we expect the proposed legislation will address this issue.

Question #4. I look forward to hearing the recommendations of the interagency task force. When can this Committee expect to receive those recommendations?

Answer:

We have had several frank, detailed and useful discussions with our colleagues on the interagency task force. The members of the task force share a common goal of trying to strengthen and improve the reemployment rights law while at the same time make it as simple and easy to understand as possible. We are working very hard on this difficult task but I believe it is still too early to say by when we can expect the Task Force to complete its work.

Question #5. Could you give the subcommittee an idea of what recommendations we might expect to receive?

Answer:

In general terms, we are studying the possible improvement of the law in order to make it simpler and more logical in its construction. This would involve the clarification of confusing sections and the defining of terms used in the law. Perhaps most importantly, we are carefully reviewing proposals involving the best way to bring valid claims to a speedy resolution.

It is too early to provide any definitive information about our ultimate proposals because we are still in the process of weighing and evaluating each possible change. We want to be

certain that all of the ideas and proposals to change the law are given careful and objective consideration and to be sure to the extent possible that such changes will result in their intended effect before we recommend any changes.

Question #6. This is a bit off the subject of reemployment, but nonetheless I am concerned about this. Do you have any idea how educational institutions address the situation when a reservist who is a student must miss classes because of reserve duties?

Answer:

No, sir, we do not. We have no hard data about reservists who miss classes or drop out of school because of their reserve duties. As you know, the current law provides reemployment rights only for employees of private employers, Federal employees, and employees of the States and their political subdivisions. Because students are not considered to be employees, they currently have no statutory reemployment or reinstatement rights. We would defer the answer of this question to DOD and NCESGR.

Question #7. In testimony which we will hear later, the Naval Reserve Association recommends that the DOL be given the authority to determine which VRR cases have merit and the authority to provide legal representation to VRR claimant.

What do you think of this suggestion? Would the Department of Labor Solicitors be prepared to assume this responsibility?

Answer:

Currently, the Department of Labor has the authority to make

merit determinations on VRR cases and recommend to DOJ that it litigate those cases (about 5%) which the Department cannot resolve informally. However, DOJ has the final say in such matters. John Depenbrock of DOL's Solicitor's Office can best address changes to this procedure.

Question #8. The Naval Reserve Association also points out that VETS does not have subpoena authority under current law. Has the absence of this authority been detrimental to the effectiveness of the VETS staff? Would you support a change which would provide subpoena authority?

Answer:

Under the current law we are dependent upon the employer's cooperation in obtaining information. Accessing employer records, interviewing employees associated with the case and protecting those individuals from retaliation are dependent upon the goodwill of the employer.

Until recently, the lack of subpoena authority has not been a major roadblock in our investigations, although in some cases VETS could have provided better, more timely service to claimants if it had this authority, such as in seniority and pension cases. However, with the 1986 amendments, which added protection from discrimination in hiring, retention or promotion of members of a reserve component to the law, subpoena authority becomes essential in our case investigations.

In previous VRR contexts, there was a clear employer and employee relationship -- the employer had, at some point, wanted that claimant as an employee. In failure to hire situations, the employer just as clearly does not want to establish that relationship. Therefore, it becomes incumbent on VETS to examine not only the facts surrounding the particularly hiring situation being grieved, but also the employer's overall hiring retention and promotion practices regarding Guard and Reserve members. That is, the circumstances and historical context within which the alleged discrimination took place. In these cases, our ability to ascertain the facts would be severely restricted without subpoena authority. I would like to assure you that the use of this power would be judiciously used and closely monitored.

Question #9. You mention in your testimony that you expect the number of cases relating to hiring discrimination to increase as a result of DOL outreach efforts. Would you describe your outreach program for the Subcommittee? Do you think most military personnel, both active and reserve, are aware of their reemployment rights?

Answer:

Mr. Chairman, I wish that I could say that the majority of separatees as well as members of the National Guard and Reserve are fully aware of their rights. I can't, despite our best efforts and those of the Department of Defense. I do believe, however, that many more are aware because of our increased

involvement with separation center activities as well as our staff visits to Guard and Reserve Units. I also believe that many more have been made aware through the publicity efforts of the NCESGR which has, for several years, been pointing out in their publicity both the importance of the reserve components to preserving of our nation's defense and of preserving the reservist's rights to maintaining a strong reserve.

We in VETS recognize that one of our primary responsibilities under this statute is education -- instructing the guardsman or reservist on their rights and informing and making employers aware of their responsibilities. And we take this seriously. Each professional member of our staff at the State and Regional level must include an outreach program in his or her Annual Work Plan. This plan must establish goals for visits to both active installation Separation Centers and Reserve/Guard Units. Moreover, we don't just discuss reemployment rights; we discuss job opportunities and other VETS programs as well. The process is a continuing one and we believe it bears fruit as people with problems approach our staff with reemployment rights complaints and many others approach us with requests for intervention in the job service area.

I believe we need to do still more, and I expect our people to do more in FY 1988 and again in FY 1989. We will continue to do

more until we are assured that everyone who is entitled to and needs our services knows they exist and how to get them.

Question #10. In your testimony you indicate that 60% of the VRR claims are filed by individuals in the reserve component. I conclude from this that 40% of the cases are filed by individuals leaving active duty. Frankly, this percentage surprises me. I would have thought there would be very few active duty cases because there is no longer a draft and so many new recruits are young and have very limited work histories. How do you explain the surprisingly high number of active duty claims?

Answer:

Our statistics show that about 36%, not 40%, of VRR claims are filed by persons who performed active duty. The other 4% are persons who were rejectees, examinees or others. Of this 36%, however, it is important to remember that many are not persons who have just been released from active duty. The percentage of cases filed by individuals seeking reemployment after leaving initial active duty is much smaller, probably around one half of that or 18%. (This is only an estimate since our statistics do not differentiate between recently separated veterans, and those veterans that have been out of active duty for longer periods.) The other approximately 18% of these claims represent persons who were in the service at one time, who were reemployed, and later learned that they should have had rights to pensions, vacations, seniority, status or higher pay rates. We still receive claims, for example, from persons who served in World War II and Korea and who were not credited with their military service for purposes of computing their pension benefits.

QUESTIONS SUBMITTED TO THE HONORABLE STEPHEN M. DUNCAN
ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS
U.S. DEPARTMENT OF DEFENSE

VETERANS' REEMPLOYMENT RIGHTS

QUESTION: You noted that 30 percent of the unprogrammed losses in the Reserve components can be attributed to problems with employers. If employer support were to be improved and attrition rates reduced by even five percent, wouldn't that result in a rather significant cost savings?
ANSWER: In recent studies of demographically similar groups we have found that only 50 percent of a given year group continue service through the third year. Accordingly, we could expect substantial cost savings associated with replacing and training a Guardsmen or Reservist because of employer conflicts.

QUESTION: How are members of the Guard and Reserve informed of their reemployment rights?
ANSWER: The information is available through various sources:
- Briefings mandated by Reserve Component regulations. For example, Department of the Army Pamphlet 135-2 provides guidance on reemployment rights briefings to troop unit soldiers "...as soon as possible after assignment to the unit and at least one month before Annual Training." (Reservists in other training categories receive Veterans Reemployment Rights (VRR) information from the Army Reserve Personnel Center.)
- Pre-deployment briefings to Reservists and their dependents.
- Employer personnel policies (often contained in an employee handbook) and in labor union agreements.
--For Federal Sector employees, policies/guidance promulgated by the Office of Personnel Management in the Federal Personnel Manual and by Federal Agency directives (e.g., Section 517 of the Postal Employee & Labor Relations Manual).
- National Committee for Employer Support of the Guard and Reserve's (NCESGR's) Ombudsman Program.
- NCESGR's direct mailings to Reserve units and ESGR State Committees.
- NCESGR's nationwide public service advertising program through the Ad Council.
- Articles and other information in Service publications and those of the Reserve Associations. [Excellent example is article in September 1987 issue of The Army Lawyer, entitled, "Which Comes First, the Army or the Job?...Federal Statutory Employment and Reemployment Protections for the Guard and Reserve," which provides an in-depth review of the VRR Statute.]

QUESTION: I think we can all agree that employers who hire Reservists may incur additional costs and inconveniences because of the absence of the Reservists-employees. Are there efforts by DoD to reward those employers who support their Reservist employees? Is there an awards program or something similar which would reenforce employer support? What efforts are made to minimize hardship on employers?
ANSWER: Yes. Since 1973, it has been the goal of the National Committee for Employer Support of the Guard and Reserve (NCESGR) to recognize and reward employers who are supportive of employees who are Guardsmen or Reservists. NCESGR currently has three levels of employer awards:
- My Boss is a Pro--certificates of appreciation to employers nominated by one or more of their employees (Reservists). Over 10,000 such awards were made in 1987.
- State Chairman Award--certificate presented by each State Chairman to recognize those employers who have been particularly supportive of Reservists. Each state makes six awards each year.
- PRO PATRIA--This most prestigious award is signed by the Secretary of Defense and by the National Chairman of our Employer Support Program. The award recognizes the single most outstanding employer in each state and is made once each year.

The Department of Defense recognizes and, of course, greatly appreciates the sacrifices employers have to make in releasing an employee for military duty. To minimize hardships on employers, the Department has consistently advocated a policy for Guard and Reserve members to give their employers as much advance notice as possible of training commitments. For example, employee-Reservists are encouraged to provide copies of their monthly training schedules and/or orders to the employer as soon as those items are available. We have also urged Reservists, their commanders and employers to work together to avoid job-reserve duty conflicts and to reach a suitable accommodation when problems arise.

QUESTION: I have some concerns about Federal employees who serve in the Armed Forces, both active and Reserve, who seek to exercise their rights under Chapter 43 of Title 38, U.S.C. Do these individuals experience any more problems or fewer problems than those who are employed in the private sector?
ANSWER: We do not have any data which would allow us to make a valid comparison. The 1986 Reserve Component surveys did indicate that both officers and enlisted personnel who were Federal and State employees felt that they had less of a problem meeting training requirements than employees in the private sector. On the other hand, there have been several individual instances where government employers were less cooperative than private employers.

A partial analysis of private and public sector employee inquiries/complaints in calendar year 1983 and for the January-March 1984 period was conducted by National Committee for Employer Support of the Guard and Reserve (NCESGR). The data showed that on average, problems involving private sector employers outpaced those involving Federal employers nearly 5 to 1, and other public employers approximately 4 to 1. There have been no further efforts to compile additional data.

QUESTION: The Naval Reserve Association representative testified that the Department of Labor should be given the responsibility of assisting Federally employed veterans or reservists in their efforts to secure their reemployment rights. In your view, are these problems in this area and, if so, would you support this recommendation?
ANSWER: Certainly there have been individual instances in which Federal government employers have not fully respected the employment rights of their employees forces. That is not acceptable. Currently, however, we do not have any objective data which would allow us to measure the magnitude of this particular problem.

While I support any action to safeguard the job rights of Guardsmen and Reservists, I am primarily interested in procedures which will resolve employer - Reserve/employee conflicts quickly and informally. I believe that a prompt resolution of such disputes is far more important than which federal agency enforces the employment rights.

QUESTION: You noted in your testimony that 10 percent of the recent contacts received from employers and labor unions concern how to stay in compliance with Federal law. What are the subjects of the other 90% of the calls?
ANSWER: I must first clarify the statistics:

In calendar year 1987, the National Committee for Employer Support of the Guard and Reserve (NCESGR) National Ombudsman acted on 5,488 inquiries/complaints. Some 11% (585) of these were from employers, unions, or employment interest groups. Of the 585 contacts, approximately 10% (58) involved policy-type questions to stay in compliance. Expressed another way, such questions accounted for slightly more than 1% of the total number of contacts handled by the Ombudsman staff in 1987.

Ninety percent of the 585 contacts dealt with employment rights and responsibilities in a general sense, as illustrated by the following examples of questions received:

. Is my employee entitled to vacation on top of his/her absence for military training?

. Has the employee forfeited vacation because reserve training took place during our plant shut-down period?

. Can I talk directly with my employee's Reserve commander about scheduling conflicts? This is my busiest season.

. Do health insurance, retirement and vacation/sick leave benefits continue if the employee is absent for military duty?

. Now that the employee is back from basic training, how long does he have to ask me for his job back with our company?

Ombudsmen provide guidance and explain rights and responsibilities under the law. They do not offer legal advice or interpret provisions of the law. Persons contacting an Ombudsman are referred to the Department of Labor or they are provided information on appropriate OPM guidance.

QUESTION: In your testimony, you indicated that many of the disputes which are handled by the ombudsmen arise from misunderstanding about which provisions of the law apply to the particular duty in question, and how these provisions should be interpreted. Would you give us some examples?
ANSWER: The Ombudsman's role is not to "interpret" or "second guess" the law, but to make clear what it says and to explain the types of military duty.

A common misunderstanding involves time off for "inactive duty training." Most employers do not know the difference between "active duty," "active duty for training" and "inactive duty for training" (the latter being the duty status for weekend "drills"). The Ombudsman can explain the different types of duty and related provisions of Federal and State law and how they relate to certain employer policies.

As an example, Postal Workers may use paid military leave for active or inactive duty training, while other Federal workers may use such leave for active duty only.

A second example would be clarification of state versus federally-directed duty for National Guard members: Only federal duty is covered by the federal Statute.

Another common misunderstanding relates to "voluntary" duty. Many employers believe that Reservists should only be called to duty in the event of a contingency or war. They may understand the necessity for weekend drills and summer training, but they frequently do not see the necessity for military schools and other additional training. The Ombudsman explains duty requirements and provisions of the law regarding time off for training and reemployment rights. The Ombudsman also assists in having the employee-Reservists, employer, and Reserve commander discuss military training obligations.

QUESTION: Do National and State Employer Support Committee Ombudsmen and the Department of Labor coordinate with one another regarding their respective roles and responsibilities?
ANSWER: Since the National Ombudsman Program was established by the Secretary of Defense in September 1974, coordination with the Department of Labor and other federal and state agencies has been fundamental to the National Committee for Employer Support of the Guard and Reserve's (NCESGR's) goal of retaining National Guard and Reserve members in the military, while trying to alleviate conflicts between their military obligations and civilian employment. Enactment of P.L. 93-508, in Dec 1974, clarified ombudsman responsibilities in 38 USC 2025, whereby ESGR ombudsmen at the state and national levels assist the Secretary of Labor in reemployment rights matters.

Since the Employer Support of the Guard and Reserve Ombudsman Program was established, it has been the policy that it would not eliminate or supersede the military unit commander's responsibilities. We continue to encourage Guardsmen and Reservists to first consult with their unit commanders who may be able to resolve problems locally and informally. Ombudsmen are available to commanders, Reservists, employers and the general public to provide information and referral services.

With the formation of state and territorial ESGR Committees in 1979, volunteer ombudsmen were provided an Ombudsman Guide--authored in cooperation with Department of Labor's Office of Veterans' Reemployment Rights (VRR)--as a ready reference. Since then, they have regularly received information to make them aware of various provisions and changes in the law. Many of these informational materials are Department of Labor items. All NCESGR-produced materials state that NCESGR does not have authority to enforce the law, and that cases which require legal advice or formal assistance must be referred to Department of Labor or the Office of Personnel Management/Merit System Protection Board, as appropriate.

Recently, Department of Labor representatives have been included as guest briefers at Ombudsman workshops held in conjunction with NCESGR's 1987 National Conference in Washington, D.C., a special workshop in Massachusetts earlier this year, and at NCESGR regional conferences held this year in Detroit, San Francisco and Nashville.

Other examples that illustrate close cooperation between NCESGR and the Department of Labor may be found in our responses to complaints that are routinely provided to the Department of Labor, presentations and/or attendance by Department of Labor representatives at State Committee meetings, and "feedback" from Ombudsmen and Department of Labor agents in the field who cite their joint and cooperative efforts in handling VRR problems.

QUESTION: In your statement you indicated that lack of information and misinformation about the importance and quality of the Selected Reserve are the primary factors which result in lack of support for individual Guardsmen and Reservists.

The state employer programs could make an extremely valuable contribution by doing outreach to employers in the state and correcting the situation. Is employer outreach a major function of the state programs?

ANSWER: Outreach is the primary focus of the state programs. A grass roots plan was published by National Committee for Employer Support of the Guard and Reserve (NCESGR) in 1980 containing the following specific objectives for state committees:

OBJECTIVE A: Establish a network of volunteer civilian business and civic leaders at state and grass root levels.

OBJECTIVE B: Raise employers' awareness of the role of National Guard and Reserve Forces in national security.

OBJECTIVE C: Increase knowledge and understanding among members of the Guard and Reserve of the role of employer support.

OBJECTIVE D: Increase knowledge and understanding by employers, managers, and supervisors of their rights and obligations under the law.

OBJECTIVE E: Recognize employers and supervisors who actively support employee participation in the National Guard and Reserve.

Specific programs to accomplish these objectives were outlined and are presented in selected pages of Half The Victory - A Grassroots Plan, NCESGR publication, 1980.

ATTACHED: Selected pages from Half The Victory - A Grassroots Plan, NCESGR publication, 1980.

QUESTION: This is a bit off the subject of reemployment, but nonetheless I am concerned about this. Do you have any idea how educational institutions address the situation when a reservist who is a student must miss classes because of reserve duties?

ANSWER: We do not yet know the magnitude of this particular problem. We do, however, know that the National Committee for Employer Support of the Guard and Reserve and the Department of Labor have received increasing numbers of inquires from students seeking assistance. Since there is no protection in the current Veterans Reemployment Rights law, each school's policy controls the situation today.

QUESTION: You explained in your testimony that Advertising Programs have been implemented nationwide and even locally in certain states to increase public/employer awareness of the National Guardsmen and Reservist Program. Have you been able to evaluate the program's effectiveness in reducing actual employer/Reservist conflict?

ANSWER: In view of the substantial recent growth in the number of Reserve component personnel training overseas, increases in the readiness standards which National Guard and Reserve units must attain, and the resulting pressures of family and employment, I expected to see employer employee conflicts increase thereby causing attrition figures to rise. However, attrition rates have not yet increased significantly. I attribute this, in great measure, to the increasingly effective employer support program conducted by the National Committee for Employer Support of the Guard and Reserve and the tremendous support provided by The Advertising Council.

QUESTION: Given the need as you stated in your testimony to educate employers regarding the military reserve component, do you have future plans to include employers in exercises similar to the REFORGER program, or do you have other suggestions for employer/public education programs?
ANSWER: The principle activity for providing employers with the opportunity to learn about the National Guard and Reserve through on-site visits is called "Operation Bosslift". The Bosslift to Europe for REFORGER occurred in 1986 to support a major troop move of the Wisconsin National Guard and was a special situation. While I do not preclude the possibility of a need for a Bosslift overseas in the future, I believe that we can educate employers by providing them ample opportunity to see their employees (or other Guard and Reserve members) conducting tough, realistic training in the United States.

The National Committee for Employer Support of the National Guard and Reserve, assisted by the state committees, conducted 43 funded Bosslifts last year and is programed to conduct 50 this year. A Bosslift is funded when we reimburse the participants for meals and housing at government rates. Approximately 1700 employers traveled to Reserve Component training sites in 1987 under this program. Each state committee is authorized one funded Bosslift a year and as many unfunded Bosslifts as they wish to conduct. An unfunded Bosslift involves no government funds and usually takes employers to training sites within the state.

Following a review of training and a visit with members of the Reserve and National Guard, the participants receive a briefing concerning the current role played by the National Guard and Reserve. Reactions to the visit and the briefings are invariably "I didn't realize" and "I never knew" the increased role of the Reserve Components. This is a particularly effective program.

QUESTION: On page 14 of your testimony, you mention a "reasonableness test." Can you explain this concept and how you can envision its application?
ANSWER: As I noted in my prepared Statement, the reasonableness test which has been applied by some federal courts is, in essence, an attempt to balance the values of the Reserve military obligation, against the perceived needs of the employer. We recognize that an individual Reservist might seek orders for military duty which is desirable, but not necessary, and that particular duty might require an unreasonable absence from civilian employment. Such instances are, however, exceptions to the general practice.

Normally, military orders to Reservists are based on clear military necessity and the individual Reservist has little or no control over the orders. The most acute problems involve military programs for which there are shortages of trained personnel which require lengthy training periods. It is unfair to the Reservist and ultimately very harmful to our retention efforts to place a Reservist in the position of having to guess in advance of his training duty at the reasonableness of his military orders versus the reasonableness of his employer's needs. The current "reasonableness" test sets no specific standard by which a Reservist can in advance of leaving for training duty determine whether a request for leave of absence or the leave itself will be considered to be reasonable by his employer or by a court. In most cases, the employers' view of whether the duration and nature of this training is considered "reasonable" is not determined until after the fact--after the orders are executed and reinstatement is requested. The test is ad hoc, subjective, and based upon facts which may be beyond the control of the Reservist.

The most significant damage to the Department of Defense is the loss of personnel and opportunities to train qualified people. Conscientious individuals generally will forego the opportunity to attend longer programs such as nurses training or helicopter pilot training if the length of the absence could be considered by the employer to be unreasonable.

The second most significant damage to the Department is that of assuring employment security in convincing people to leave their jobs to attend training. When reinstatement is made difficult or is not forthcoming at all, the Defense Department appears to have violated its promise.

Because there is always a possibility that some individual Reservist may abuse his position in the Reserve forces to the detriment of his employer, I am reluctant to recommend legislation that would broadly and absolutely deny an employer's right to discipline their employees who are absent from work for Reserve military duty. I do believe, however, that a strong presumption should exist that validly issued military orders must be honored by employers. The employment rights of each Reservist must be protected and prima facie, validly issued military orders must be respected and honored unless the employer can demonstrate abuse by the Reservist-employee or some other, similar factor.

QUESTION:

Is the Office of Personnel Management (OPM) a member of the Interagency Task Force of Veterans' Reemployment Rights (VRR), or have they participated in their meetings and discussions regarding veterans' reemployment rights issues? If not, why not?

RESPONSE:

The objective of the VRR Task Force was to study the reemployment rights statute, to discuss it from the various agencies' perspectives and to consider possibilities for making the statute and its administration by the Department of Labor more effective and supportive to its clientele. Since we were initially focusing on the sections of the law which are enforced by this agency, OPM was not included in the preliminary discussions.

As the work of the Task Force progressed, it became apparent that OPM would have to be included in the discussions. On January 21, 1988, the Workgroup met with staff from OPM to discuss reemployment rights for federal employees. We provided their staff with several suggestions and encouraged OPM to join us in submitting changes to the statute. We are still in communication with OPM regarding their complaint process.

During the last two months we have been meeting with officials from Department of Defense and Department of Justice to further refine the Task Force's recommendations and fully develop a legislative proposal. As mentioned during the testimony, we anticipate that we will be able to make recommendations to the Secretary in the near future concerning changes to the VRR law, as enforced by the Department of Labor.

○